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In The

Supreme Court of the United States

ERIC SCHMIDT, PAUL SCHMITZ, MICHAEL O'KEEFE, SR., and GARY R. BENNETT,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a prosecution witness gives testimony on cross-examination that the prosecution knows is false, is the prosecution obligated to disclose or correct the falsehood?

2. Did *Kyles v. Whitley*, 514 U.S. 419 (1995), overrule *sub silentio* this Court's holding in *Giglio v. United States*, 405 U.S. 150 (1972), that the prosecution's failure to correct false testimony requires a new trial if there is any reasonable likelihood that the false testimony could have affected the verdict?

3. If a jury instruction was correct under settled law at the time of trial and thus was not objected to, but is clear error under a supervening decision of this Court, for purposes of determining whether there was "plain error" under Fed. R. Crim. P. 52(b) is the burden of persuasion on the issue of prejudice on the Government or the defendant?

LIST OF PARTIES

Petitioners Eric Schmidt, Michael H. O'Keefe, Sr., and Gary Bennett were defendants in the District Court and appellants and cross-appellees in the Court of Appeals. Petitioner Paul Schmitz was a defendant in the District Court and an appellant in the Court of Appeals. Respondent, who was plaintiff in the District Court and appellee and cross-appellant in the Court of Appeals, is the United States. Also a defendant in the District Court and appellant and cross-appellee in the Court of Appeals was John O'Brien.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
A. The District Court Grants a New Trial Because of Perjury	4
B. The Court of Appeals Vacates the New Trial Order	6
C. The Court of Appeals Precludes the District Court from Holding an Evidentiary Hearing	8
D. Sentencing	10
E. The Appeal from the Convictions and Sentences	11
REASONS FOR GRANTING THE WRIT	12
I. THE COURTS OF APPEALS ARE SPLIT ON WHETHER THE PROSECUTION MAY REMAIN SILENT WHEN IT KNOWS ITS WITNESS HAS TESTIFIED FALSELY ON CROSS-EXAMINATION	12
A. The Government Denies Due Process When It Secures a Criminal Conviction Based on Evidence Known To Be False	12

TABLE OF CONTENTS – Continued

Page

B. The Circuits Are Divided as to Whether Prosecutors Must Correct False Testimony Given by Prosecution Witnesses While on Cross-Examination 14

C. The Court of Appeals' Decision Is in Conflict with *Giglio* 16

D. The Issue Is Important 16

E. The Court of Appeals' Decision Is Untenable 18

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER *KYLES V. WHITLEY* CREATED A NEW STANDARD FOR ASSESSING PREJUDICE IN FALSE-EVIDENCE CASES 21

III. A UNIFORM RULE SHOULD BE ESTABLISHED AS TO WHO BEARS THE BURDEN OF PERSUASION ON THE ISSUE OF PREJUDICE, WHERE AN ERROR WAS UNCLEAR AT THE TIME OF TRIAL BUT BECOMES CLEAR ON APPEAL BECAUSE OF A SUPERVENING DECISION 27

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Abell v. Potomac Insurance Co., 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989) 27

Alcorta v. Texas, 355 U.S. 28 (1957) 12

Berger v. United States, 295 U.S. 78 (1935) 18, 19

Boyd v. French, 147 F.3d 319 (4th Cir. 1998) 26

Brady v. Maryland, 373 U.S. 83 (1963) 21, 22, 23

Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986) 15

Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979) 14

Chapman v. California, 386 U.S. 18 (1967) 22

DuBose v. Lefevre, 619 F.2d 973 (2d Cir. 1980) 14

Duggan v. Texas, 778 S.W.2d 465 (Tex. Crim. App. 1989) 15

Fahy v. Connecticut, 375 U.S. 85 (1963) 22

Giglio v. United States, 405 U.S. 150 (1972) ..... *passim*

Gilday v. Callahan, 59 F.3d 257 (1st Cir. 1995) 14

Hernandez v. Johnson, 213 F.3d 243 (5th Cir.), *cert. denied*, 121 S.Ct. 400 (2000) (No. 00-5945) 24, 26

Johnson v. Trickey, 882 F.2d 316 (8th Cir. 1989) 14

Kopycinski v. Scott, 64 F.3d 223 (5th Cir. 1995) 25, 26

Kotteakos v. United States, 328 U.S. 750 (1946) 23

Kyles v. Whitley, 514 U.S. 419 (1995) ... 22, 23, 24, 25, 26

Laird v. Integrated Res., Inc., 897 F.2d 826 (5th Cir. 1990) 27

TABLE OF AUTHORITIES – Continued

Page

Lee v. Illinois, 476 U.S. 530 (1986) 19

Maryland v. Craig, 497 U.S. 836 (1990) 19

In re Michael, 326 U.S. 224 (1945) 19

Miller v. Fenton, 474 U.S. 104 (1985) 17

Miller v. Pate, 386 U.S. 1 (1967) 12, 13

Mooney v. Holohan, 294 U.S. 103 (1935) 12, 19, 21

Napue v. Illinois, 360 U.S. 264 (1959) ..... *passim*

Neder v. United States, 527 U.S. 1 (1999) 27

Pennsylvania v. Hallowell, 383 A.2d 909 (Pa. 1978) 15

People v. Savvides, 136 N.E.2d 853 (N.Y. 1956) 13, 15

Pointer v. Texas, 380 U.S. 400 (1965) 18

Pyle v. Kansas, 317 U.S. 213 (1942) 12

Rakas v. Illinois, 439 U.S. 128 (1978) 17

Reed v. Ross, 468 U.S. 1 (1984) 28

Standefer v. United States, 447 U.S. 10 (1980) 17

Strickler v. Greene, 527 U.S. 263 (1999) 19, 22, 23

Taylor v. Lombard, 606 F.2d 371 (2d Cir. 1979) 14

Tennessee v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993) 15

Town of Newton v. Rumery, 480 U.S. 386 (1987) 17

United States ex rel. Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975) 14

United States v. Agurs, 427 U.S. 97 (1976) 14, 21, 22, 23, 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Aichele, 941 F.2d 761 (9th Cir. 1991) ..7, 15

United States v. Arnold, 117 F.2d 1308 (11th Cir. 1999) 26

United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997) 14, 23

United States v. Bagley, 473 U.S. 667 (1985) 21, 22

United States v. Bontkowski, 865 F.2d 129 (7th Cir. 1989) 15

United States v. Brown, No. 93-50037, 1993 WL 503204 (9th Cir. Dec. 8, 1993) (unpublished) (table at 12 F.3d 1108) 15

United States v. David, 83 F.3d 638 (4th Cir. 1996) 28

United States v. Frost, 125 F.3d 346 (6th Cir. 1997) ...23, 26

United States v. Harris, 498 F.2d 1164 (3d Cir. 1974) 14

United States v. Iverson, 637 F.2d 799 (D.C. Cir. 1980), *modified*, 648 F.2d 737 (D.C. Cir. 1981) 14, 20, 23

United States v. LaPage, 231 F.3d 488 (9th Cir. 2000) 26

United States v. Martin, 59 F.3d 767 (8th Cir. 1995) 26

United States v. Nobles, 422 U.S. 225 (1975) 18

United States v. Olano, 507 U.S. 725 (1993)..... 27

United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988) 14

United States v. Rodriguez, 162 F.3d 135 (1st Cir. 1998) 23, 26

United States v. Runge, 593 F.2d 66 (8th Cir. 1979) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Vaziri, 164 F.3d 556 (10th Cir. 1999) 26

United States v. Viola, 35 F.3d 37 (2d Cir. 1994) 27

United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997) 26

United States v. Williams, 81 F.3d 1434 (7th Cir. 1996) 25, 26

Walker v. Virginia, 356 S.E.2d 853 (Va. App. Ct. 1987) 15

White v. Ragen, 324 U.S. 760 (1945) 12

Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984) 15

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) 19

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. V 2, 25

STATUTES:

28 U.S.C. § 1254(1) 2

RULES:

Fed. R. Crim. P. 33 8

Fed. R. Crim. P. 52(b) 27

MISCELLANEOUS:

Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director* (1999) 17, 18

Fox Butterfield, *Federal Study Finds Decline in Executions*, N.Y. TIMES, Dec. 11, 2000, at A16 18

PETITION FOR WRIT OF CERTIORARI

Petitioners Eric Schmidt, Paul Schmitz, Michael O'Keefe, Sr., and Gary Bennett pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 11, 2000.

OPINIONS BELOW

The Court of Appeals' opinion affirming petitioners' convictions and its order denying rehearing are unreported and are reproduced at Appendix ("A.") 1a and A. 203a. Its opinion vacating the grant of a new trial is reported at 128 F.3d 885 and is reproduced at A. 34a, its order denying without prejudice the Government's application for mandamus is unreported and is reproduced at A. 162a, and its order granting a writ of mandamus is unreported and is reproduced at A. 163a. The Court of Appeals' order staying the District Court's grant of release pending appeal, with Judge Dennis dissenting, is reported at 169 F.3d 281 and is reproduced at 165a. The District Court's memorandum and order granting a new trial is unreported and is reproduced at A. 68a. The District Court's order granting petitioners' motion for an evidentiary hearing, and its order supplementing that order, are unreported and are reproduced at A. 153a and A. 155a.

JURISDICTION

The District Court's judgment was entered January 13, 1999. The Court of Appeals' judgment was entered August 11, 2000. A. 1a. Petitioners' timely petition for rehearing en banc was denied September 14, 2000. A. 203a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution is set forth at A. 207a.

STATEMENT

A 23-count indictment returned in the Eastern District of Louisiana charged petitioners and co-defendant John O'Brien with conspiracy, wire fraud, mail fraud, and money laundering. A. 3a. The charges were based on events following the demise of Physicians National Risk Retention Group ("PNRRG"), which wrote medical malpractice insurance policies for physicians. A. 2a.

As a result of hearings held in 1990 and 1991, the Louisiana Department of Insurance ("DOI") determined that PNRRG was insolvent and moved to place it in conservation. A. 2a. In March 1991, five months before a conservation order was entered, the PNRRG board of directors turned over management of the Group to Associated Auditors, Inc. ("AA"), a company owned by petitioner O'Keefe. A. 73a. Following extensive discussions

between petitioners and the DOI, the petitioners and DOI advised the Board of PNRRG to enter into a reinsurance agreement whereby ongoing insurance coverage of low-risk physicians would be ceded to a reinsurer, and certain assets of PNRRG would be transferred to the reinsurer. A. 7a, 73a-74a, 76a; Gov't Ex. 27A at pp. 66-74. The Board voted to approve the agreement. A. 7a.

The reinsurance was provided by a dormant Bahamian insurance company, Builders & Contractors Insurance ("BCI"). A. 2a, 76a. Petitioners' dealings with BCI were through Charles Donaldson. A. 75a. A longtime veteran of the insurance industry and the former Registrar of Insurance for the Bahamas, Donaldson represented that he was the managing director and underwriting manager of BCI. R., vol. 85, pp. 14, 21. In a publicly-filed document, BCI also held Donaldson out as its agent. O'Keefe Ex. 6. But after the Government began an investigation, Donaldson asserted in connection with a guilty plea that he had misrepresented his authority in executing the reinsurance agreement. A. 7a.

The Government's central allegation was that the reinsurance agreement was part of a fraudulent scheme, and that the petitioners simply used BCI to obtain money for themselves. The Government's principal witnesses were Donaldson and Johnny Moore, an attorney who had represented DOI in matters relating to PNRRG. A. 36a. Petitioners vigorously disputed that they had engaged in a fraud, and the Court of Appeals later described their version of events as "not wholly implausible." A. 12a.

On March 21, 1996, following the dismissal of five counts, the jury found petitioners O'Keefe, Schmidt, and

Bennett guilty on 16 of the remaining counts. A. 70a. Petitioner Schmitz was acquitted on all counts but one. A. 70a-71a.

A. The District Court Grants a New Trial Because of Perjury.

On May 1, 1996, petitioners filed a timely motion for a new trial and an evidentiary hearing. On August 15, 1996, the District Court (Hon. Morey L. Sear, Chief Judge) granted the motion for a new trial. A. 68a. The court concluded that the jury had not been apprised of all relevant information required to reach a verdict. A. 151a.

First, the court ruled that Government witness Donaldson had perjured himself; that the Government had known of the perjury but had failed to correct it, contrary to *Napue v. Illinois*, 360 U.S. 264 (1959); and that on redirect examination of Donaldson and in its closing argument, the Government had improperly sought to bolster Donaldson's credibility by suggesting that he had not perjured himself. A. 144a. The prosecution had "admit[ted] knowledge of two acts of perjury by Donaldson," A. 137a, and the court found that Donaldson also had testified falsely on a third subject. A. 138a. (The court had asked the lead prosecutor, at the argument on the new trial motion, whether he had any question that Donaldson did commit perjury. The lead prosecutor had answered "Yes, but not the perjury that everybody has been talking about." R., vol. 12, pp. 67-68.) The court further found that "the true nature and scope of Donaldson's perjury was never disclosed or corrected by the

government, or revealed on cross-examination by the defendants." A. 140a.

Second, the court found that "[t]he sheer number of perjuries [by Donaldson] calls into question whether some as-yet-unidentified additional acts of perjury occurred." A. 138a.

Third, the court found that another critical Government witness, Johnny Moore, had repeatedly contradicted himself, producing "utter surprise on the faces of the government lawyers several times during Moore's testimony." A. 149a. At one point the Government lawyers had acknowledged their surprise on the record. *Id.*

Fourth, the Government's production of FBI 302 reports of interviews with Donaldson and Moore had been "piecemeal and late." A. 122a. "I cannot conclusively find that the production of the reports during trial did not adversely affect the court's ability to reach a just conclusion, particularly in light of the government's conduct in connection with the FBI 302 reports of Charles Donaldson." *Id.*

The court placed particular weight on the Government's deliberate failure to correct Donaldson's perjured testimony, together with the contradictions in Moore's testimony:

> [T]he defendants have made a sufficient showing that the undisclosed evidence concerning Charles Donaldson, when considered in conjunction with the consistently contradictory testimony of the other key government witness, Johnny Moore, reasonably could be taken to put the whole case in such a different light as to

> undermine confidence in the verdict, and I reject the government's argument that the presence of other evidence against the defendants necessarily turned a tainted trial into a fair one.

A. 150a. No evidentiary hearing was necessary, the court determined, in light of the Government's admissions at the argument on the new trial motion. A. 151a.

In his order granting a new trial, Chief Judge Sear recused himself from further involvement in the case. A. 152a. After the case was assigned to Judge Mary Ann Vial Lemmon, the Government moved for reconsideration and submitted affidavits of the prosecutors and certain other members of the prosecution team. A. 40a, 61a. Judge Lemmon referred the motion for reconsideration to Chief Judge Sear, who denied it. *Id.* The Government then appealed from that denial. *Id.*

B. The Court of Appeals Vacates the New Trial Order.

The Court of Appeals vacated the order granting a new trial. A. 34a (hereafter *"O'Keeefe I"*). The court held that under *Napue* the prosecution does not have a duty to correct false testimony given by a prosecution witness while being cross-examined by defense counsel. "[W]e have limited material lies to those that occur as a part of the prosecution's case." A. 52a. According to the Court of Appeals,

> The prosecution has a duty only to "refrain from knowingly presenting perjured testimony and from knowingly failing to disclose 'that testimony used to convict a defendant was false.' "

> [*United States v.*] *Aichele*, 941 F.2d [761,] 766 [9th Cir. 1991] (quoting *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989)). Thus, when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony. *Id.* We have adopted this position because it is the duty of the jury to determine the credibility of the witnesses.

A. 52a-53a.

Because the Court of Appeals held that a prosecutor does not have a duty to correct false testimony by its witnesses on cross-examination, the court ruled that Chief Judge Sear had erred in finding a due process violation based upon the Government's failure to disclose that Donaldson had perjured himself on cross-examination. "With respect to the district court's legal conclusion of materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution." A. 56a.

In assessing the effect of Donaldson's falsehoods, the Court of Appeals applied the standard this Court has adopted for the prosecution's nondisclosure of exculpatory evidence, rather than the standard this Court has applied when the prosecution fails to correct evidence it knows is false. "[W]e do not find that there is *a reasonable probability* that the jury would have reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony." A. 62a (emphasis added). *See also* A. 52a (relying

upon a decision of this Court requiring a showing of a reasonable probability of a different outcome, where exculpatory evidence is not disclosed).

After finding no denial of due process, the Court of Appeals went on to hold that the District Court's grant of a new trial likewise was not supported by "the interests of justice," Fed. R. Crim. P. 33. A. 62a-66a.[1]

C. The Court of Appeals Precludes the District Court from Holding an Evidentiary Hearing.

On remand, petitioners reasserted their request for an evidentiary hearing, a request that Chief Judge Sear had denied as unnecessary because he had deemed a new trial warranted based on the existing record. Petitioners also moved for a new trial based on newly discovered evidence that the prosecution consented to the transfer of $45,000 of trust funds held by Donaldson to his lawyer's trust account, to pay Donaldson's court-ordered restitution. A. 4a-5a.

District Judge Lemmon granted the request for an evidentiary hearing. A. 153a. While cautioning that the hearing would not be "a general discovery device," A. 157a, the court ordered the Government to produce, for *in camera* review, FBI 302 reports and notes relating to trial

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[1] Petitioners and co-defendant John O'Brien unsuccessfully petitioned this Court to grant certiorari to review the Court of Appeals' interlocutory ruling overturning the grant of a new trial. *See* 523 U.S. 1078 (1998) (No. 97-1542). The 1997 petition addressed questions different from those raised in this petition.

witnesses, grand jury testimony by FBI Agent Susan Phillips in this case or in the prosecution of Donaldson, transcripts of the proceedings involving Donaldson, and the factual basis for his guilty plea. A. 160a. The court also directed the prosecutors to certify that they had reviewed the Government's files in connection with this case, and had determined that no undisclosed *Brady* material existed. A. 160a-61a. The court described the statements made by the Government attorneys in affidavits seeking to distance themselves from Donaldson's perjury as "a virtual admission that the prosecution had not made the investigation required by *Brady* into the existence of *Brady* material that was within the government's possession, until the time of trial." A. 158a.

The Government then filed an application for a writ of mandamus. On August 27, 1998, the Court of Appeals denied the application without prejudice, but added the "clarification" that "the remand after the previous appeal was intended to allow the district court to address narrow questions *based solely on the already-developed trial court record.*" A. 162a (emphasis added). The panel (a different panel) that had decided *O'Keefe I* had not so stated (or indeed addressed at all whether petitioners were entitled to an evidentiary hearing), A. 34a-67a, and no reason or authority was cited by the new panel for denying petitioners an evidentiary hearing concerning the Government's compliance with its *Brady* obligations.

On September 4, 1998, the District Court directed the Government to comply with its order concerning *in camera* review and certification. A. 155a. The Government

then asked the Court of Appeals to clarify its order denying the Government's application for a writ of mandamus. On September 28, 1998, the Court of Appeals granted a writ of mandamus, stating:

> The panel opinion in this case resolved all pertinent questions related to the testimony of Donaldson and Moore and the government's alleged failure to turn over or belated disclosure of *Brady* materials. No further proceedings on these matters as raised in the motion for new trial were necessary in light of this court's mandate. . . . [T]he remand after the previous appeal was intended to allow the district court to address the narrow questions specified in Section V of the panel opinion based solely on the already-developed record. . . .

A. 163a-64a. The Court of Appeals thus prohibited the District Court from conducting an inquiry to determine whether the Government had complied with *Brady*.[2]

D. Sentencing.

In January 1999, the District Court sentenced petitioner O'Keefe, then age 67, to 19 years and seven months in prison, petitioner Schmidt to ten years and one month, and petitioner Bennett to eight years and one month. In sentencing O'Keefe, the court noted that "numerous recommendations for leniency" had been received from

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[2] The Court of Appeals excepted from its order petitioners' motion for new trial based on newly discovered evidence relating to the $45,000 transfer to the trust account of Donaldson's lawyer. A. 164a. The District Court subsequently denied that motion. A. 5a.

"respected members of the community." R. 4242. The court added, however, that "[m]ost of them are questioning the fairness of your trial, *which I have been instructed by the Fifth Circuit not to delve into.*" *Id.* (emphasis added).

E. The Appeal from the Convictions and Sentences.

Finding that there were substantial questions to be raised on appeal, the District Court granted the motion of petitioners O'Keefe, Schmidt, and Bennett and co-defendant O'Brien for release pending appeal. (Petitioner Schmitz did not receive a prison sentence.) But in a one-sentence order the Court of Appeals granted the Government's motion to stay the order granting release. A. 165a. In a dissenting opinion, Judge Dennis sharply questioned the rulings in *O'Keefe I* that *Napue* does not apply to false testimony by a prosecution witness on cross-examination, and that a defendant seeking a new trial under *Napue* must show a reasonable probability of a different outcome. A. 196a-98a.

On August 11, 2000, the Court of Appeals affirmed petitioners' convictions and sentences. A. 1a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE SPLIT ON WHETHER THE PROSECUTION MAY REMAIN SILENT WHEN IT KNOWS ITS WITNESS HAS TESTIFIED FALSELY ON CROSS-EXAMINATION.

The courts of appeals are divided on the question whether the prosecution's duty not to let false evidence go uncorrected applies when a prosecution witness testifies falsely on cross-examination by defense counsel. Seven Circuits have concluded that the prosecution's duty of correction does apply in that situation, but the two Circuits with the largest volume of cases (the Fifth Circuit and the Ninth Circuit) have held that it does not. This Court should decide which view is correct.

A. The Government Denies Due Process When It Secures a Criminal Conviction Based on Evidence Known To Be False.

"As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' " *Giglio v. United States*, 405 U.S. 150, 153 (1972). A series of unanimous decisions beginning with *Mooney* have established that securing a criminal conviction based on evidence known to be false is a denial of due process. *See Giglio*, 405 U.S. at 153; *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *White v. Ragen*, 324 U.S. 760, 764 (1945); *Pyle v. Kansas*, 317 U.S. 213, 216

(1942). "There has been no deviation from that established principle." *Miller*, 386 U.S. at 7.

The Court also has unanimously held that a prosecutor's inaction, after evidence has been presented that the prosecutor knows is false, is as much a denial of due process as is the deliberate presentation of false evidence:

> [I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.

Napue, 360 U.S. at 269 (citations omitted). " 'A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.' " *Id.* at 269-70 (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956)).[3] That a prosecutor may not remain silent in the face of evidence he knows to be false was reaffirmed by this Court in *Giglio*, again without dissent. *See* 405 U.S. at 153. Whether a prosecutor knowingly presents perjured testimony or instead knowingly fails to correct the perjured testimony of a government witness when it appears, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair" and "involve[s] a corruption of the truth-seeking

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[3] *See also Napue*, 360 U.S. at 269 ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.").

function of the trial process." *United States v. Agurs*, 427 U.S. 97, 103, 104 (1976).

B. The Circuits Are Divided as to Whether Prosecutors Must Correct False Testimony Given by Prosecution Witnesses While on Cross-Examination.

Despite the unanimity and strong language of this Court's decisions, the Circuits are now divided on a fundamental issue concerning the scope of a prosecutor's duty under *Napue* and *Giglio* not to allow false evidence to go uncorrected. Specifically, the Circuits disagree as to whether that duty applies to the testimony of a prosecution witness on cross-examination.

The District of Columbia, First, Second, Third, Fourth, Eighth, and Eleventh Circuits treat false testimony by prosecution witnesses on cross-examination as obligating the prosecution to correct or disclose the falsehood, where the prosecution knows that the testimony is false. *See United States v. Iverson*, 637 F.2d 799, 801-06 (D.C. Cir. 1980), *modified*, 648 F.2d 737 (D.C. Cir. 1981); *Gilday v. Callahan*, 59 F.3d 257, 268-69 (1st Cir. 1995); *DuBose v. Lefevre*, 619 F.2d 973, 974-75, 978 (2d Cir. 1980); *Taylor v. Lombard*, 606 F.2d 371, 373-75 (2d Cir. 1979); *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 264, 267 (2d Cir. 1975); *United States v. Harris*, 498 F.2d 1164, 1168-69 (3d Cir. 1974); *Campbell v. Reed*, 594 F.2d 4, 6-8 (4th Cir. 1979); *Johnson v. Trickey*, 882 F.2d 316, 318-19 (8th Cir. 1989); *United States v. Runge*, 593 F.2d 66, 74 (8th Cir. 1979); *United States v. Arnold*, 117 F.3d 1308, 1315, 1317 (11th Cir. 1997); *United States v. Rivera Pedin*, 861 F.2d

1522, 1525, 1529-30 (11th Cir. 1988); *Brown v. Wainwright*, 785 F.2d 1457, 1459-60, 1464 (11th Cir. 1986); *Williams v. Griswald*, 743 F.2d 1533, 1541-43 & n.20 (11th Cir. 1984).[4] Numerous state appellate courts agree.[5]

Nevertheless, the Fifth Circuit and the Ninth Circuit hold that the prosecution is not required to disclose or correct perjury by one of its witnesses on cross-examination. The Fifth Circuit so held in this case. *See* A. 52a ("[W]e have limited material lies to those that occur as a part of the prosecution's case. . . . [W]hen the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony." (citations omitted)). The Ninth Circuit adopted the same limitation in *United States v. Aichele*, 941 F.2d 761 (9th Cir. 1991), a decision relied upon by the Fifth Circuit here. A. 52a. In *Aichele* the Ninth Circuit held that allegedly perjured testimony did not warrant a new trial because it "was prompted by Aichele's cross-examination; even assuming the testimony was perjured, the government did not elicit it." 941 F.2d at 766. *Accord United States v. Brown*, No.

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[4] *See also United States v. Bontkowski*, 865 F.2d 129, 133 (7th Cir. 1989) ("the government must correct the false testimony of a government witness, whether the testimony is elicited upon direct examination by the prosecutor, or whether elicited upon cross-examination by defense counsel") (dicta) (footnote & citations omitted).

[5] *See, e.g., People v. Savvides*, 136 N.E.2d at 854; *Pennsylvania v. Hallowell*, 383 A.2d 909, 910-11 (Pa. 1978); *Tennessee v. Spurlock*, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993); *Duggan v. Texas*, 778 S.W.2d 465, 467-69 (Tex. Crim. App. 1989) (en banc); *Walker v. Virginia*, 356 S.E.2d 853, 855, 861 (Va. App. Ct. 1987).

93-50037, 1993 WL 503204, at **1 (9th Cir. Dec. 8, 1993) (unpublished) (table at 12 F.3d 1108) (rejecting claim that conviction should be reversed because the Government knowingly presented perjured testimony; "the allegedly perjured testimony was not elicited by the government. Rather, Sobel's misstatements occurred during cross-examination. Thus, there can be no claim of misconduct by the government.").

C. The Court of Appeals' Decision Is in Conflict with *Giglio*.

As Judge Dennis noted, the Fifth Circuit's holding that the duty to correct false evidence does not apply to the testimony of government witnesses on cross-examination also conflicts with this Court's decision in *Giglio*. A. 196a-97a. The *only* false evidence in *Giglio* was false testimony by a Government witness on cross-examination. *See* 405 U.S. at 151-52. This Court unanimously reversed the defendant's conviction, relying upon the prior holding in *Napue* that a conviction must fall under the Constitution " 'when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' " *Id.* at 153 (quoting *Napue*, 360 U.S. at 269).

D. The Issue Is Important.

Whether a prosecutor's duty not to allow false evidence to go uncorrected applies to testimony by a government witness on cross-examination is a basic issue in the administration of criminal justice that is worthy of

this Court's attention.[6] In both federal and state court, challenges to criminal convictions based on the knowing use of false evidence are common, and those challenges frequently focus on testimony given by a prosecution witness on cross-examination.

The conflict among the Circuits is especially important because the two Circuits adhering to the minority view (the Fifth Circuit and the Ninth Circuit) are the two busiest. Of the 59,923 criminal cases commenced in federal court in the 12 months ending September 30, 1999, fully 24,726 – more than 41 percent – were filed in one of those two Circuits. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director* 186-88 (1999) ("*Report*"). Similarly, of the 20,251 habeas corpus petitions filed in federal court based on a state conviction, 8,338 – again more than 41 percent – were filed in the Fifth Circuit or the Ninth Circuit. *See id.* at 143, 145, 147. And 118 habeas corpus petitions challenging state death sentences were filed in one of those two Circuits, or nearly

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[6] *Cf. Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (certiorari granted because case raised "a question important to the administration of criminal justice"); *Standefer v. United States*, 447 U.S. 10, 14 (1980) ("Because the question presented is one of importance to the administration of criminal justice on which the Courts of Appeals are in conflict, we granted certiorari."); *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (same); *Rakas v. Illinois*, 439 U.S. 128, 130 (1978) ("[w]e granted certiorari in light of the obvious importance of the issues raised to the administration of criminal justice").

half of the nationwide total of 248 petitions. *See id.* at 143, 145, 147.[7]

E. The Court of Appeals' Decision Is Untenable.

The limitation that the Court of Appeals has imposed on a prosecutor's duty to disclose or correct false evidence is fundamentally unsound. That wholly arbitrary exception is illogical and vitiates basic and long-established protections for a citizen charged with committing a crime.

Cross-examination is integral to the pursuit of "[t]he dual aim of our criminal justice system . . . [,] 'that guilt shall not escape or innocence suffer.' " *United States v. Nobles*, 422 U.S. 225, 230 (1975) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). "The right to confront and to cross-examine witnesses is primarily a

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[7] Of the 521 habeas corpus petitions challenging state death sentences that were pending before a district court during the 12-month period ending September 30, 1999, some 266 – more than half – were pending in the Fifth Circuit or the Ninth Circuit. *See Report* at 149, 151, 153. During the current calendar year, 40 of the 84 death sentences that have been carried out nationwide have taken place in Texas. *See* Fox Butterfield, *Federal Study Finds Decline in Executions*, N.Y. TIMES, Dec. 11, 2000, at A16.

functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). *See also Maryland v. Craig*, 497 U.S. 836, 846 (1990) (describing cross-examination as "the 'greatest legal engine ever invented for the discovery of truth' " (quoting *California v. Green*, 399 U.S. 149, 158 (1970))).

The Court of Appeals' decision is irreconcilable with the goals of the criminal justice system, the vital importance of cross-examination, and the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987); *Berger v. United States*, 295 U.S. at 88. To say that a government attorney may remain silent and proceed with a trial, as if nothing had happened, when he knows that one of his witnesses has lied on cross-examination, contradicts basic understandings about the purpose of a criminal trial, the significance of cross-examination, and the duties of prosecutors.

The distorting effect of false testimony in no way depends on which side happens to be examining the witness when the false testimony is given, or whether the testimony is given on direct or cross. As this Court said in *In re Michael*, 326 U.S. 224 (1945), "[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." *Id.* at 227. Certainly perjury on cross-examination can do as much harm as perjury on direct examination. Often key facts such as promises of leniency and prior inconsistent statements are explored only on cross-examination.

The Court of Appeals' holding permits prosecutors to circumvent the constitutional prohibition against presentation of false testimony. If a prosecutor knows one of his witnesses is prepared to give false testimony on a certain subject, under *Mooney* and later cases the prosecutor plainly could not elicit that testimony. But under the Court of Appeals' decision the prosecutor need only excise the subject of the proposed testimony from his direct examination. If the defense attorney goes into the area on cross-examination and the witness lies, the Court of Appeals' decision allows the prosecutor to remain silent.

To condone such silence is to ensure that many cases will go to the jury tainted by testimony the prosecution knows is false. When a prosecution witness lies on cross-examination, members of the prosecution team may well be the only persons other than the witness who know the testimony is false. For example, "in practical experience, few, if any, factors are more likely to induce an accused to testify, possibly falsely, against another, than the expectation of prosecutorial or sentencing leniency." *Iverson*, 637 F.2d at 803. A witness who is prepared falsely to incriminate the defendant often will be prepared falsely to deny that he was given assurances of leniency. Only the prosecutor or government agents may know the denial is false. If the prosecution believes that its duty of correction under *Napue* and *Giglio* does not apply, the case may proceed to verdict with the falsehood unrevealed.

The Court of Appeals went astray in seeking to justify its holding as necessary to protect defense counsel's role. *See* A. 53a ("it is the prerogative of defense counsel to plan his or her cross-examination strategy, and undue

clarification or interruption by the prosecution might interfere with that strategy"). The issue is not whether the prosecutor must come forward *during* defense counsel's cross-examination, but whether the prosecutor must at some point in the trial disclose the falsehood or correct it.

"The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). By restricting for no good reason a prosecutor's duty to correct false evidence when it appears, the Court of Appeals has undermined that principle. This Court should grant review and reverse the Court of Appeals' decision.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER *KYLES V. WHITLEY* CREATED A NEW STANDARD FOR ASSESSING PREJUDICE IN FALSE-EVIDENCE CASES.

The courts of appeals are also divided as to the standard governing the determination of whether the prosecution's improper presentation of, or failure to correct, false evidence was sufficiently prejudicial to require a new trial.

Although in the past quarter-century this Court has not decided a case involving such conduct by the prosecution, in *Giglio* the Court held that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . . ' " 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271); *see also Agurs*, 427 U.S. at 103; *United States v. Bagley*,

473 U.S. 667, 679 (1985) (opinion of Blackmun, J., joined by O'Connor, J.). In contrast, where the prosecution fails to disclose evidence tending to exculpate the defendant or to impeach a prosecution witness (hereafter "*Brady* material"), a new trial is necessary only if there is a "reasonable probability" that disclosure would have affected the verdict. *See Strickler*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. 419, 433-41 (1995).

The any-reasonable-likelihood standard applied in the false-evidence cases is "a strict standard of materiality." *Agurs*, 427 U.S. at 104. "We have treated 'reasonable likelihood' as synonymous with 'reasonable *possibility*' and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt." *Strickler*, 527 U.S. at 299 (Souter, J., concurring in part and dissenting in part) (emphasis added). *See Bagley*, 473 U.S. at 679-80 (opinion of Blackmun, J., joined by O'Connor, J.) ("Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." (footnote omitted)); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) (finding "little, if any, difference" between reasonable-possibility standard of *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), and standard requiring State to prove that an error was harmless beyond a reasonable doubt).

The reasonable-probability standard is considerably harder for a defendant to satisfy. *See Strickler*, 527 U.S. at

289-96 (holding that defendant was not entitled to relief under reasonable-probability standard even though this Court did not agree that the withheld materials would have provided little or no help to the defense, and even though the materials could have been used to impeach the only disinterested eyewitness narrative account of the crime).[8] Whereas the any-reasonable-likelihood standard asks whether the prosecution's conduct was harmless beyond a reasonable doubt, the reasonable-probability standard asks whether in the absence of the undisclosed evidence the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 289 (quoting *Kyles*, 514 U.S. at 434).

In its 1995 decision in *Kyles*, this Court clarified the reasonable-probability standard applicable when *Brady* material is not disclosed. 514 U.S. at 434-41. In the same decision, the Court put to one side cases involving knowing use of false evidence. *Id.* at 433 n.7 ("The Court noted [in *Agurs*] that 'a conviction obtained by the knowing use

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[8] *See also, e.g., United States v. Rodriguez*, 162 F.3d 135, 146 (1st Cir. 1998) (describing any-reasonable-likelihood standard as "more favorable to the defendant" than the reasonable-probability standard); *United States v. Frost*, 125 F.3d 346, 382 & n.17 (6th Cir. 1997) (describing any-reasonable-likelihood standard as "more defense-friendly" than the reasonable-probability standard); *United States v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997) (describing any-reasonable-likelihood standard as "less stringent" than the reasonable-probability standard); *Iverson*, 637 F.2d at 805 n.20 (describing the any-reasonable-likelihood standard as "stricter than" the standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), and explaining that "[a] different and lesser standard is applied where other types of *Brady* violations are involved").

of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' [W]e do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category." (quoting *Agurs*, 427 U.S. at 103) (citation omitted)).

Despite the pains this Court took in *Kyles* to make clear that it was not dealing with a false-evidence claim, the Fifth Circuit, though in some cases applying the any-reasonable-likelihood standard, has moved in the direction of interpreting *Kyles* as creating a new, unitary standard applicable to both nondisclosure and false-evidence cases. Thus, the Court of Appeals here applied the reasonable-probability standard in assessing petitioners' contention that the Government's failure to correct Donaldson's perjured testimony required a new trial. *See* A. 62a ("[W]e do not find that there is a reasonable probability that the jury would have reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony."); *see also* A. 52a ("The Supreme Court has recently defined materiality in terms of a 'reasonable probability' of a different outcome." (quoting *Kyles*, 514 at 434)).

The Fifth Circuit employed the same reasonable-probability standard in *Hernandez v. Johnson*, 213 F.3d 243 (5th Cir.), *cert. denied*, 121 S.Ct. 400 (2000) (No. 00-5945), where it denied a certificate of appealability to a prisoner who contended that the State had presented false testimony in obtaining his death sentence. The prisoner's claim lacked merit, the Fifth Circuit held, because he had

not shown that the allegedly false testimony "undermined confidence in the outcome of the trial." *Id.* at 253 (citing *Kyles*, 514 U.S. at 434)). *Accord Kopycinski v. Scott*, 64 F.3d 223, 225-26 (5th Cir. 1995) (emphasis added) (footnote & citations omitted):

> The prosecution's suppression of evidence favorable to the accused violates the Due Process Clause if the evidence is material either to guilt or to punishment. . . . Likewise, the prosecution's knowing failure to correct false testimony violates the Due Process Clause if the false testimony reasonably could have affected the judgment of the jury.
>
> *In either case, the nondisclosed evidence must be material to require a new trial.* Therefore, we must affirm the district court if we conclude that the nondisclosed evidence is immaterial. *Evidence is material if a reasonable probability exists that, had the evidence been disclosed to the defense, the proceeding's result would have been different.*
>
> The Supreme Court discussed the materiality standard recently in *Kyles v. Whitley*. A "reasonable probability" of a different result is shown when the nondisclosure puts the case in a different light so as to undermine confidence in the jury verdict.[9]

The Seventh Circuit has employed a standard similar to the standard adopted by the Fifth Circuit. In *United*

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[9] *See also Kopycinski*, 64 F.3d at 227 ("[W]e conclude that the nondisclosed impeachment evidence *and the uncorrected false testimony* are not material because they do not put the case in a different light so as to undermine our confidence in the jury's guilty verdict." (emphasis added)).

States v. Williams, 81 F.3d 1434 (7th Cir. 1996), "[t]he government knew that some of [its] witnesses were lying when they testified that they had stopped using drugs after being arrested in 1988." *Id.* at 1438. The Government "made no effort to correct the witnesses' lying denials to the jury." *Id.* The Seventh Circuit referred to *Giglio*, but interpreted *Kyles* as clarifying the standard adopted in the earlier case. *See id.* at 1438, 1440. Accordingly, the Seventh Circuit applied the reasonable-probability standard of *Kyles*. *See id.* at 1440.

In contrast, eight other Circuits have continued, in cases decided after *Kyles*, to apply the any-reasonable-likelihood standard in false-evidence cases. *See United States v. Rodriguez*, 162 F.3d 135, 146 (1st Cir. 1998); *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997); *Boyd v. French*, 147 F.3d 319, 330 (4th Cir. 1998); *United States v. Frost*, 125 F.3d 346, 382 n.17 (6th Cir. 1997); *United States v. Martin*, 59 F.3d 767, 770 (8th Cir. 1995); *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000); *United States v. Vaziri*, 164 F.3d 556, 563 (10th Cir. 1999); *United States v. Arnold*, 117 F.2d 1308, 1315, 1317-18 (11th Cir. 1999).

Certiorari should be granted to resolve the conflict among the Circuits and to decide the standard for determining whether a prosecutor's presentation of, or failure to correct, false evidence was sufficiently prejudicial to require a new trial. That standard must be applied in numerous federal and state cases each year. Moreover, nothing in *Kyles* supports the Fifth Circuit's implicit conclusion that that decision overruled *Giglio sub silentio* with respect to the standard applicable to false-evidence cases. The Fifth Circuit's decisions in this case and in *Hernandez* and *Kopycinski* improperly water down an

established and much-needed protection against wrongful conviction.

III. A UNIFORM RULE SHOULD BE ESTABLISHED AS TO WHO BEARS THE BURDEN OF PERSUASION ON THE ISSUE OF PREJUDICE, WHERE AN ERROR WAS UNCLEAR AT THE TIME OF TRIAL BUT BECOMES CLEAR ON APPEAL BECAUSE OF A SUPERVENING DECISION.

The decision below is also in conflict with the Second Circuit's decision in *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994). *Viola* holds that "[w]hen a supervening decision alters settled law, the three [*United States v.*] *Olano*[, 507 U.S. 725 (1993)] conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." 35 F.3d at 42. In contrast, here the Court of Appeals put the burden on petitioners to show that instructing the jury on the element of materiality, which *Neder v. United States*, 527 U.S. 1, 21-25 (1999), held is an element of mail and wire fraud, would have altered the jury's verdict. A. 18a. The Court of Appeals allocated the burden of persuasion to petitioners even though at the time of trial in March 1996, the law in the Fifth Circuit was clear that false or fraudulent statements did not have to be material to support a mail or wire fraud charge.[10] The Court of Appeals did not

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[10] *See Laird v. Integrated Res., Inc.*, 897 F.2d 826, 839 & n.53 (5th Cir. 1990); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989).

suggest that trial counsel was remiss in not seeking an instruction on materiality, nor would there have been any basis for such a suggestion given the state of the law in 1996.

It is an important question whether the Government should bear the burden of establishing lack of prejudice, where the absence of an objection at trial is entirely understandable but by the time of appeal a supervening change of law has established that error was committed. The answer to that question is significant in numerous cases that arise in the aftermath of decisions of this Court or a court of appeals dramatically changing the governing law. Moreover, there is no justification for requiring a defendant to bear the burden on the issue of prejudice, merely because at trial his lawyer did not make an objection which would have been contrary to then-existing law. *Cf. Reed v. Ross*, 468 U.S. 1, 15 (1984) ("[A] rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose."); *United States v. David*, 83 F.3d 638, 645 (4th Cir. 1996) (Luttig, J.) ("Requiring objection at trial in the face of established precedent to the contrary would result in defendants raising frivolous objections simply to ensure that they would receive on appeal the benefit of any later reversals of precedent – the very kind of waste of judicial resources that the contemporaneous objection rule was intended to discourage.").

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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December 13, 2000

CONTENTS OF APPENDIX

Page

A. Opinion of the Court of Appeals Affirming Convictions (August 11, 2000) 1a

B. Opinion of the Court of Appeals Vacating Order Granting a New Trial (Nov. 11, 1997).... 34a

C. Memorandum and Order of the District Court Granting a New Trial (Aug. 15, 1996)..... 68a

D. Minute Entry of the District Court Concerning Grant of Motion for an Evidentiary Hearing (April 6, 1998)..... 153a

E. Order and Reasons of the District Court Supplementing Prior Order Granting Motion for an Evidentiary Hearing (June 5, 1998) 155a

F. Order of the Court of Appeals Denying Petition for Mandamus Without Prejudice (Aug. 27, 1998) 162a

G. Order of the Court of Appeals Granting Government's Motions for Clarification and for Mandamus (Sept. 28, 1998) 163a

H. Order of the Court of Appeals Granting Government's Motion for Stay of Order Granting Release Pending Appeal (March 9, 1999)..... 165a

I. Order of the Court of Appeals Denying Rehearing (Sept. 14, 2000) 203a

J. Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc (Dec. 15, 1997) 205a

K. Fifth Amendment to the United States Constitution 207a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30082

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

ERIC SCHMIDT; MICHAEL O'KEEFE, SR.;
JOHN O'BRIEN; GARY BENNETT,

Defendants-Appellants
Cross-Appellees,

PAUL SCHMITZ,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(USDC No. 95-CR-106-2-S)

August 11, 2000

Before REAVLEY, DAVIS and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:*

Five defendants appeal their convictions for conspiracy, mail and wire fraud, and money laundering in connection with a fraudulent insurance scheme. Michael O'Keefe, Eric Schmidt, John O'Brien, and Gary Bennett were convicted on the overarching count 1 conspiracy count and other counts. Paul Schmitz was convicted on a single mail fraud count. O'Brien also appeals his sentence, and the government cross-appeals on two sentencing matters. We affirm.

BACKGROUND

The evidence presented at trial supports the following events. O'Keefe, despite two prior fraud convictions, was selected to operate the management company of Physicians National Risk Retention Group, Inc. ("PNRRG"), a Louisiana medical malpractice insurer. The management company was named Associated Auditors (AA). Schmidt, O'Keefe's son-in-law, served as president of PNRRG. Bennett and O'Brien were also involved in the management of the PNRRG, and Schmitz was a claims manager.

PNRRG became insolvent and the state of Louisiana moved to liquidate it. The defendants arranged to have Builders and Contractors Insurance Limited (BCI), a dormant Bahamian corporation under the control of Charles

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* Pursuant to. 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Donaldson, act as a reinsurer. Defendants promised that coverage of PNRRG's physicians would continue and that all claims would be paid by BCI. PNRRG and the Louisiana Department of Insurance authorized the transfer of over $10 million in cash assets of PNRRG to a trust account of O'Keefe's law firm, with the funds to be held on behalf of BCI. Defendants entered into a reinsurance contract with Sphere Drake, an established reinsurance company, but this contract was canceled a few months later. The defendants failed to maintain coverage and pay claims for the insured physicians as promised.

Instead, Associated Insurance Consultants, Inc. (AIC), a company owned by defendants Schmidt, Bennett, and O'Brien, signed a secret management contract with BCI. Ultimately, over $5 million in assets of PNRRG ended up in the personal bank accounts of the [*sic*] Schmidt, Bennett, and O'Brien.

The five defendants were charged in a multi-count indictment which included conspiracy, wire fraud, mail fraud, and money laundering counts. Two of the main government witnesses were Donaldson and Johnny Moore, participants in the scheme.

An FBI "302 report" was prepared prior to trial. The report documented an interview of Donaldson by an FBI agent. According to the report, someone had stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI Contract." At trial, Donaldson testified and the government turned the 302 report over to defendants, as required by the Jencks Act, 18 U.S.C. § 3500. The government did not ask any

questions about the 302 report. However, on cross-examination, Donaldson admitted that he had falsely accused O'Keefe of altering the minutes. Donaldson also, arguably, perjured himself at the trial by first claiming that he had altered the minutes, then stating that he could not remember if he had accused O'Keefe of altering the minutes, and finally admitting that he had falsely told the FBI that O'Keefe had suggested that the minutes be altered. Judge Sear concluded after the trial that (1) Donaldson had falsely accused O'Keefe of participating in altering the minutes, (2) the government knew about this falsehood, (3) the government had failed to notify defendants of Donaldson's falsehood, and (4) defendants were therefore entitled to a new trial. Judge Sear recused himself after granting the new trial, but later denied a motion for reconsideration. The basis of the new trial was that even though the government did not try to prove that O'Keefe had altered the minutes, Donaldson had falsely accused O'Keefe of doing so, and this lie went to the credibility of Donaldson, a key witness.

The government appealed the order for new trial, and we reversed. *United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997) (*O'Keefe I*). We concluded that a new trial was not warranted, noting that the jury was fully informed of Donaldson's false statements, and that the government had not relied on the false statements in presenting its case. *See id.* at 896-98. After we remanded the case to the district court, the district court considered motions for new trial on grounds of newly discovered evidence relating to Moore and Donaldson. Donaldson had allegedly received a secret $45,000 payment from the government which contradicted the government's statement to the

jury that it had offered no promises or inducements to Donaldson beyond his plea agreement. Judge Lemmon denied the new trial motions, and entered judgments of conviction and sentenced the defendants.

DISCUSSION

A. *Sufficiency of Evidence*

All five defendants challenge the sufficiency of the evidence. The verdict will be upheld if a rational jury could have found the essential elements of the offense beyond a reasonable doubt. *See United States v. Walters*, 87 F.3d 663, 667 (5th Cir. 1996). We view the evidence, including all reasonable inferences drawn therefrom and all credibility determinations, in the light most favorable to the verdict. *See id.*

1. *Conspiracy Count*

Count 1 alleged a conspiracy to commit wire and mail fraud. To sustain a conspiracy conviction under 18 U.S.C., § 371, the government must prove (1) an agreement between two or more persons, (2) to commit a crime, and (3) an overt act committed by one of the conspirators in furtherance of the conspiracy. *See United States v. Gray*, 96 F.3d 769, 772-73 (5th Cir, 1996). The elements of mail fraud under 18 U.S.C. § 1341 consist of (1) a scheme to defraud, (2) the use of the mails to execute the scheme, and (3) the specific intent of the defendant to commit fraud. *See United States v. Salvatore*, 110 F.3d 1131, 1136 (5th Cir. 1997). Wire fraud under 18. U.S.C. § 1343 can be established upon proof of (1) a scheme to defraud,

and (2) the use of interstate wire communications in furtherance of the scheme. *See Gray*, 96 F.3d at 773. The Supreme Court has stated that because the mail and wire fraud statutes share the same language in relevant part, the same analysis applies to each. *See Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

Defendants O'Keefe, Schmidt, O'Brien, and Bennett were convicted on the overarching conspiracy count. The indictment charged a wide-ranging scheme to use mail and wire facilities to execute a fraudulent scheme "(a) to defraud [PNRRG], its insured physicians and patients making medical malpractice claims against those physicians; (b) to obtain money and property by means of false pretenses, promises, and representations; and (c) to deprive [PNRRG] of its right to the honest services of its President, Eric Schmidt."

Evidence, some disputed and some undisputed, supports the following events and is sufficient to support the conspiracy convictions. O'Keefe, with two prior convictions, operated and owned AA, the management company of PNRRG. PNRRG had been organized by a group of physicians to provide themselves with liability insurance. AA became the management company after the Louisiana Department of Insurance (DOI) insisted that existing management be ousted in an attempt to financially salvage PNRRG.

Though PNRRG had substantial assets, it became statutorily insolvent and the DOI moved to liquidate it. The DOI had decided to place PNRRG in liquidation by late 1991. Prior to this decision the DOI had placed PNRRG in "conservation" under Louisiana law, through a

judicial order by a state court. O'Keefe and Schmidt advised the PNRRG board to liquidate PNRRG and transfer the assets to a new insurer.

The defendants arranged to have BCI, a Bahamian corporation under the control of Charles Donaldson, act as a reinsurer. BCI was a dormant Bahamian insurance company at the time. An Agreement of Reinsurance between BCI and PNRRG was approved by the PNRRG board and the DOI. Donaldson had worked with Bennett in the past. Donaldson pleaded guilty to misrepresenting his authority to execute the reinsurance agreement. Defendants falsely promised that coverage of PNRRG's physicians would continue and that all claims would be paid by BCI.

The board of PNRRG and the DOI authorized the transfer of over $10 million in cash assets of PNRRG to BCI, but the assets were to be held on American soil in a trust account of O'Keefe's law firm. As promised, defendants entered into a reinsurance contract with Sphere Drake Insurance p.l.c., an established British reinsurance company, but this contract was canceled a few months later, at O'Brien's suggestion, without notifying the DOI or the insured physicians or their agents. The district court concluded, properly under the evidence, that "a reasonable jury could have found that the defendants created a false impression that Sphere Drake was covering the risks when, in fact, the contract was canceled and the defendants received substantial profits realized by the cancellation."

The defendants failed to maintain coverage and pay claims for the insured physicians as promised, and misrepresented that certain claims would be the reinsurers' responsibility. Instead, AIC, a company owned by defendants Schmidt, Bennett, and O'Brien, signed a secret management contract with BCI. O'Keefe acted as AIC's attorney. According to Bennett, AIC was originally formed by O'Keefe and Schmidt. Under the AIC/BCI agreement, 90 percent of any profit to BCI flowed to AIC. Schmidt, Bennett and O'Brien received over $5 million in "profits" from the O'Keefe trust account, after these funds passed through an account in the Bahamas. Funds went from the O'Keefe trust account to a Bahamian company called "Captive Managers," a sole proprietorship owned by Donaldson, who received a fee of $150,000. The funds were then almost immediately wired back to a bank account in New Orleans and largely distributed to Schmidt, Bennett, and O'Brien. District Judge Lemmon concluded that defendants used AIC as a vehicle to divert PNRRG's funds "in a bogus reinsurance agreement" with BCI. The district court fairly summarized the evidence in concluding that defendants paid Donaldson "to sign agreements and other documents on behalf of [BCI] and to funnel [$5.6 million] from the United States through [a Bahamian bank account] and to return the funds to the AIC bank account in New Orleans."

Defendants failed to disclose to the DOI and the PNRRG board that they would realize millions of dollars through their management of the reinsurance plan, and at one point denied that they would benefit financially from their efforts for the physicians.

Of the $10.7 million transferred to the O'Keefe trust account as the sum necessary to fund the reinsurance plan, defendants received over $5 million in "profits" in addition to almost $2 million paid in management fees to AIC. The PNRRG board never authorized defendants to personally receive such profits. The "profits" were funds available because defendants had canceled the Sphere Drake contract, canceled coverage for physicians, and refused to pay claims. BCI, the company that was supposedly behind the reinsurance program, received no funds. These "profits" vastly exceeded the amount paid in claims.

No action was taken by the DOI when it discovered that defendants were canceling policies because O'Keefe promised Johnny Moore, the attorney for PNRRG's estate who was responsible for taking action, that he would use his political influence to help Moore retain his position, and that Moore could use over $500,000 placed in trust with Moore as part of the reinsurance agreement. Moore and O'Keefe had negotiated the reinsurance contract. Moore is a private attorney who had been hired by the DOI to represent it in the conservation and liquidation of PNRRG. He took over $500,000 held in trust for personal use and pleaded guilty to a state bribery charge and a federal mail fraud count. In a recorded conversation, O'Keefe urged Moore not to reveal that he had taken the money.

To be sure, some of the evidence recited above was disputed. Nevertheless, we conclude that this evidence is sufficient to support the conspiracy convictions, in that a rational jury could find under this evidence that Schmidt, O'Keefe, O'Brien, and Bennett engaged in a fraudulent

scheme to surreptitiously siphon off millions of dollars in PNRRG assets. Defendants make numerous sufficiency arguments which we find unavailing.

O'Keefe argues that under *Neder v. United States*, 527 U.S. 1 (1999), decided after the trial, the Court held that mail and wire fraud statutes require that the misrepresentation or concealment concern a material fact, *id.* at 20-25, and that in the pending case any misrepresentations or omissions were not material. The jury was not instructed on the element of materiality, a matter discussed further below, but here we reject O'Keefe's argument that the evidence is insufficient to establish that defendants made material misrepresentations and omissions. In general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the party to which it was addressed. *Id.* at 16. The government's theory, supported by the evidence, was that defendants hatched a scheme to steal the assets of PNRRG. To this end, defendants misrepresented or failed to disclose material facts discussed above. For example, they misrepresented that coverage of PNRRG's physicians would continue and that all claims would be paid by BCI, misrepresented that they would not personally profit from the transactions, failed to disclose that they had canceled excess coverage, and failed to disclose their plan to transfer millions of dollars intended to capitalize the new insurance venture to their personal bank accounts. One government witness, DOI actuary Scruggs, testified that if the DOI had known what the defendants were doing to cancel doctors' coverage, it would not have entered into the reinsurance agreement with defendants and would have saved $8 million for the company in liquidation. We

think these misrepresentations and nondisclosures were certainly capable of influencing the PNRRG board and the DOI.

Appellant Bennett devotes his appeal to sufficiency of the evidence, and presents an alternative version of events that is completely at odds with the government's theory of the case. Briefly, he argues as follows. Professionals at the DOI, on the advice of numerous outside professionals, had agreed on the plan in which the defendants participated. Under this plan, some of the low risk doctors insured by PNRRG were to be separated into a new company, and some of PNRRG's assets were to be transferred to this new company. This idea actually came from an insurance expert from Missouri, William O'Bryan, whom the DOI had sought out. BCI was intended to serve only as a temporary place to "park" the insurance policies of the low risk doctors until a permanent American company could be found. An estimate was made of how much cash was needed to capitalize this new company, based on complex risk assumptions. Contracts were signed, and the defendants operated within the confines of these agreements. The defendants received a large profit not because of fraud, but only because the anticipated claims were higher than the actual claims, and there was no contractual provision for the return of profits to the DOI or the estate of PNRRG. No one, including defendants, had anticipated the windfall. Moore was a thief who stole money from an attorney trust account, and testified against the defendants for a reduction in sentence. Donaldson was caught misrepresenting his authority to act for BCI and entered into a plea bargain. He lied to the FBI and again in federal

court, resulting in the new trial granted by Judge Sear. AIC was a legitimate company responsible for all the administration of the claims and policies. BCI did not have the capacity to perform, such functions. The profits of AIC were personal profits of defendants O'Brien, Schmidt, and Bennett because AIC was a subchapter § corporation under the tax laws, and all income to such a corporation was taxable to the owners. The owners paid taxes and then used the remainder to capitalize Lemé Reinsurance Limited, a company formed to provide permanent coverage for the physicians.

While Bennett's version of events is not wholly implausible, we note that much of his argument is made without citation to the record. In any event, the evidence described above is more than sufficient to uphold the jury verdict. Donaldson and Moore were extensively cross-examined, and the jury was entitled to weigh their credibility. The jury is the final arbiter of the credibility of witnesses. *See United States v. Restrepp*, 994 F.2d 173, 182 (5th Cir. 1993). A guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain, unless the testimony is incredible or insubstantial on its face. *See United States v. Gadison*, 8 F.3d 186, 190 (5th Cir. 1993); *United States v. Hernandez*, 962 F.2d 1152, 1157 (5th Cir. 1992). Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature. *See Gadison*, 8 F.3d at 190; *United States v. Hoskins*, 628 F.2d 295, 297 (5th Cir. 1980). Insofar as Donaldson lied to the FBI and in court (which the government disputes), those

lies were rejected as a ground for a new trial in *O'Keefe I*. A rational jury could conclude that Moore, the attorney who was supposed to regulate defendants, was bribed or at least encouraged by O'Keefe to raid his trust account.

Given the totality of the evidence presented, a rational jury simply was not required to accept Bennett's explanation on appeal for why millions of dollars ended up in his personal bank account and the accounts of other defendants. The assets of PNRRG were placed with BCI in a trust account in the United States, yet over $5 million in "profits" was funneled through the Bahamas and back to the United States in transactions the jury could have found fraudulent. There was evidence that defendants had represented that there would be no profits, and that they concealed the agreement between BCI and AIC. Though defendants including Bennett claim the contractual arrangement between BCI and AIC was disclosed, there was ample evidence to the contrary. The jury could have reasonably concluded that defendants were able to secure "profits" from an insolvent insurer only because reinsurance from an established company was canceled, claims were not paid, and coverage for the insured physicians was not renewed. In the words of Judge Sear, the defendants' profit reversion "was confected by the defendants." Bennett insists that BCI had a contractual right to terminate the reinsurance coverage with Sphere Drake, and that canceling the coverage was legitimate when claims that came in were smaller than expected, especially since the cost of the Sphere Drake coverage was very high. However, the district court concluded that "a reasonable jury could have found that the defendants

created a false impression that Sphere Drake was covering the risks when, in fact, the contract was canceled and the defendants received substantial profits realized by the cancellation."

O'Brien and Bennett argue that certain testimony, such as testimony concerning which claims BCI was supposed to cover, are contradicted by the terms of the PNRRG/BCI written contract of reinsurance and are therefore inadmissible under the parol evidence rule. They cite no federal law that a criminal wire or mail fraud conviction cannot rest on misrepresentations that are inconsistent with the final written terms of an agreement. We see no merit to this argument.

2. *Other Counts*

The convictions on counts 2 and 4-8 are mail and wire fraud convictions of the four defendants – O'Keefe, Schmidt, O'Brien, and Bennett – convicted on the count 1 conspiracy count. They relate to various mailings and wire communications "for the purpose of executing the scheme set forth above," i.e., the count 1 conspiracy. The convictions on counts 14-23 are money laundering convictions of these four defendants under 18 U.S.C. § 1956(a)(2)(A). These counts allege money wire transfers "with the intent to promote the carrying on of specified unlawful activity, that is mail and wire fraud as set forth in Counts 2 through 13." The defendants argue that since they are all tied to the conspiracy count, they must fail if the conspiracy conviction is reversed, since there was no fraudulent scheme that will support them. These defendants offer no independent reason why the evidence was

insufficient on these other counts if, as we hold, the evidence is sufficient to support their convictions on count 1.

Schmitz challenges his mail fraud conviction on count 12. He was convicted solely on this count, and the other defendants were acquitted on this count. It alleged that "for the purpose of executing the scheme set forth above," i.e., the count 1 conspiracy, Schmitz sent a letter to Mark Wham, falsely stating that Schmitz was acting at the direction of the principals of Builders and Contractors Insurance, Ltd., a Bahamian Corporation, in offering a settlement for nuisance value, when the defendants had total control over disbursements of funds for the payment of claims. Wham was a personal injury lawyer with a claim against a physician who had coverage originally with PNRRG and whose coverage was transferred to BCI. Wham testified that Schmitz, acting as a claims manager, had pressured Wham to settle for nuisance value by telling Wham that he was dealing with a company out of the Bahamas with limited funds. Schmitz sent a letter as part of this negotiation. The government claims that Schmitz's conduct was fraudulent because he falsely stated in the letter that he was acting at the request of BCI, and he knew that there was money set aside in the United States to pay claims. Ultimately the physician in question was forced to settle the case out of his own pocket and Wham received no fees. Judge Sear noted that Schmitz testified before the grand jury "that he did not and was not going to contact anyone at BCI and representations to this effect contained in the letter to Wham and others were not true."

We conclude that the evidence is sufficient to support Schmitz's mail fraud conviction on count 12. A rational jury could find that Schmitz's conduct was part of a scheme to stop paying claims and transfer the assets of PNRRG to defendants.

Schmitz's acquittal on the conspiracy count and the acquittal of the other defendants on count 12 does not help him. Even if the jury's verdict is inconsistent, and we are not persuaded that it is, such an inconsistency does not require reversal of his conviction. *See United States v. Powell*, 469 U.S. 57, 62 (1984); *Dunn v. United States*, 284 U.S. 390, 393 (1932). Both the interest and the appearance of justice are fully vindicated as long as the reviewing court assures itself, as we do, that regardless of an acquittal on some other count, the evidence is legally sufficient to support a guilty verdict on the count of conviction. *See Powell*, 469 U.S. at 66-69. Given "the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity . . . the best course to take is simply to insulate jury verdicts from review on this ground." *Id.* at 68-69.

B. *Jury Charge and Response to Jury Question*

1. *Materiality Instruction*

Defendants complain that the jury charge was flawed because it did not instruct the jury on the issue of materiality with respect to mail and wire fraud. As explained above, the Supreme Court held in *Neder*, decided after the trial of the pending matter, that materiality is a element

under the wire and mail fraud statutes. As the government points out, there is some language in the jury instructions regarding materiality, such as the instructions that intent to defraud may be found "from a material misstatement of fact made with reckless disregard of the facts," and that "[a] statement is or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud." However, the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes. Defendants did not object to the trial court's failure to so instruct the jury.

The omission of the materiality element of the crime in the jury charge is subject to harmless error review if the defendant objected to the error. *See Neder* 527 U.S. at 4-6. In the absence of an objection to the jury charge, however, the omission of the element is reviewed for plain error even if the law changed after the trial. *See Johnson v. United States*, 520 U.S. 461, 463-66 (1997). Under this limited review, there must (1) exist an "error," (2) that is "plain," and that (3) affects the substantial rights of the defendant. *Id.* at 466-67. In discussing whether an error affected the defendant's "substantial rights," the Supreme Court explained that in most cases this means that the error "must have affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993). Even if these requirements are met, an appellate court may in its discretion correct a plain

error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 467.

Defendants do not establish reversible error under the plain error standard. As discussed above, we conclude that the evidence would support a jury finding that the misrepresentations and omissions were in fact material. Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the DOI. There was clear evidence of materiality.

2. *Response to Jury Question*

Schmitz complains of the district court's response to a jury question. During deliberations, the jury asked, "Can a defendant be found guilty of count 12 without knowingly furthering the scheme set forth in the indictment?" The court answered: "I cannot respond any better than I have in the charge which I gave you. Read it as it applies to this count."

A trial judge enjoys wide latitude in deciding how to respond to a question from the jury. *See United States v. Stevens*, 38 F.3d 167, 170 (5th Cir, 1994). We have explained that "[w]hen evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question

and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to. *Id.* Further, since Schmitz did not object to the court's supplemental instruction, our review is for plain error. *See United States v. Rogers*, 126 F.3d 655, 660 (5th Cir. 1997). We see no plain error. Schmitz does not show that the original charge was defective, so we fail to see how referring the jury back to the original charge could amount to plain error. Furthermore, the original charge answers the jury's question, since it plainly states that count 12 is based on a letter allegedly mailed on or about the date stated in the indictment "for the purpose of executing the scheme charged in the indictment. . . ." The jury could find the answer to its question by reading the charge.

C. *Indictment*

Schmitz complains that the superseding indictment does not set out the substantive offenses in counts 2-23 with sufficient particularity. We review de novo questions of the sufficiency of the indictment. *See United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999). The government points out that this objection was not made until after trial, but challenges based on the failure to charge an offense may be made at any time. *See United States v. Fitzgerald*, 89 F.3d 218, 221 (5th Cir. 1996). We have however found that review is more limited if there was no objection until after the trial began, agreeing with other circuits that in such circumstances "indictments are liberally construed in favor of validity where they are tardily challenged." *United States v. Green*, 964 F.2d 365, 374 (5th Cir. 1992).

An indictment is sufficient when it (1) contains the elements of the offense charged, (2) fairly informs the defendant of the charges he must meet, and (3) there is no risk of future prosecutions for the same offense. *See United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991). In assessing the sufficiency of an indictment, we focus on practical, not technical, considerations. *See United States v. Chaney*, 964 F.2d 437, 446 (5th Cir. 1992).

Schmitz does not establish that the indictment is defective under these standards. He complains that the substantive counts only incorporated paragraph B of count 1 and failed to incorporate paragraph C of the same count. We see no merit to this argument. Paragraph C was not incorporated because it listed numerous overt acts which would not have made sense if included in each separate substantive count. Each substantive count alleges that specified defendants "for purposes of executing the scheme set forth above," committed specific overt acts in violation of the wire, mail, or money laundering statutes. Defendants were fairly informed of the charges.

D. *Admission of Prior Convictions*

O'Keefe complains that the district court erred in admitting evidence of his two prior fraud convictions. Other defendants also complain that they were prejudiced by this evidence. Schmidt complains that he was particularly prejudiced because he is O'Keefe's son-in-law. The only evidence of the prior convictions was the judgments of conviction themselves, and the district court instructed the jury to limit its consideration of the prior convictions to the issue of O'Keefe's intent.

The government and O'Keefe disagree on whether a proper objection was made below. We assume without deciding that a timely objection was made. Assuming such an objection, admission of prior bad acts evidence under Fed. R. Evid. 404(b) is reviewed for clear abuse of discretion. *See United States v. Guerrero*, 169 F.3d 933, 943 (5th Cir. 1999).

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . . " This court has established a two-prong test that governs the admissibility of Rule 404(b) evidence. First, the evidence must be relevant to an issue other than the defendant's character. Second, the probative value of the evidence must not be substantially outweighed by its undue prejudice and the evidence must meet the other requirements of Rule 403. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc).

The district court applied this test, and in so doing analyzed the similarity of the prior and charged offenses. It did not clearly abuse its discretion in admitting the convictions as evidence of intent. We have frequently held that prior convictions are admissible under Rule 404(b) to prove intent, particularly in conspiracy cases. *See United States v. Prati*, 861 F.2d 82, 86 (5th Cir. 1988); *United States v. Henthorn*, 815 F.2d 304, 308 (5th Cir. 1987). "[I]n a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic act evidence." *Prati*, 861 F.2d at 86. As

we explained in *United States v. Roberts*, 619 F.2d 379 (5th Cir, 1980), evidence of a prior conviction is admissible to prove intent in a later conspiracy case involving the same criminal activity, given the unique difficulties in proving intent in a conspiracy case:

> Charges of conspiracy involve considerations not present in other criminal prosecutions. . . . Unequivocal evidence that a defendant committed a substantive offense may justify the inference that he intended to do so, but it does not plainly support the conclusion that he agreed and planned with others to commit the crime. Evidence of a defendant's association and dealings with a group of conspirators, even when he knows they intend to commit a crime, does not alone show that he himself had the requisite intent to join the conspiracy. In every conspiracy case, therefore, a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he affirmatively takes the issue of intent out of the case.

Id. at 382-83 (brackets, citation, quotation marks omitted).

O'Keefe cites *United States v. Brown*, 71 F.3d 1158 (5th Cir. 1995), in which we reversed a conviction for possession of cocaine with intent to distribute. The defense had put on one defense witness, and the prosecutor asked her whether she was aware of the defendant's prior drug conviction. *Brown* is distinguishable because it was not a conspiracy case and the government conceded that the prior conviction was admissible, if at all, as probative only on the issue of the defendant's identity. We held that

the prior conviction was not probative on the issue of the witness' identification, and that the district court had erroneously instructed the jury. *See id.* at 1162-63. In the pending case the prior convictions were admitted to prove intent, a purpose we have sanctioned in conspiracy cases, as discussed above, and the jury was properly instructed.

E. *Severance Motion*

Schmidt complains that the district court erred in denying his motion for severance. He argues that he moved for severance after he learned that the government intended to introduce O'Keefe's prior convictions. He also complains in his brief that "[t]he spillover effect of the connection between O'Keefe and Donaldson and O'Keefe and Moore presented a direct threat to Schmidt at trial."

The district court's denial of a motion to sever is reviewed for an abuse of discretion. To demonstrate an abuse of discretion, the defendant "bears the burden of showing specific and compelling prejudice that resulted in an unfair trial and such prejudice must be of a type against which the trial court was unable to afford protection." *Id.* (quoting *United States v. Faulkner*, 17 F.3d. 745, 759 (5th Cir. 1994)). We have further noted that "[t]he rule, rather than the exception, is that persons indicted together should be tried together, especially in conspiracy cases," and that "the mere presence of a spillover effect does not ordinarily warrant severance." *United States v. Pofahl*, 990 F.2d 1546, 1483 (5th Cir. 1983).

We have stated that "acquittals as to some defendants on some counts support an inference that the jury sorted

through the evidence and considered each defendant and each count separately." *United States v. Ellender*, 947 F.2d 748, 755 (5th Cir. 1991). In this case all the defendants were acquitted on one or more counts. We have further noted that appropriate instructions can reduce the possibility that the jury will improperly transfer proof of guilt from one defendant to another. *Id.* at 755. Instructions to consider separately each count and the evidence pertaining to it, and to give separate consideration to the evidence as to each defendant, have been held sufficient to eliminate the possibility of undue prejudice *See Faulkner*, 17 F.3d at 759. In the pending case the jury was given standard instructions to consider separately the evidence as to each defendant.

The district court did not abuse its discretion in denying the motion for severance.

F. *New Trial Motion Relating to Donaldson*

Defendants moved for new trial based on newly discovered evidence concerning Donaldson. They argue that they discovered at sentencing, for the first time, that the government consented to Donaldson's use of $45,000 to pay court-ordered restitution of $150,000. The $45,000 was allegedly funds that remained in Donaldson's lawyer trust account. They claim that this information is impeachment evidence under *Brady v, Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and therefore should have been disclosed by the prosecution. They also claim that the failure to provide this information gave a false impression, since the plea agreement stated that there were "no other promises or inducements" to Donaldson.

Generally, we review the denial of a motion for new trial based on newly discovered evidence exclusively for abuse of discretion. Such motions are disfavored and are reviewed with great caution. In order to merit a new trial, the defendant must prove that (1) the evidence is newly discovered and was unknown to him at the time of trial, (2) the failure to discover the evidence was not due to his lack of diligence, (3) the evidence is not merely cumulative, but is material, and (4) the evidence would probably produce an acquittal. *See United States v. Jaramillo*, 42 F.3d 920, 924 (5th Cir, 1995).

To establish a *Brady* claim, the defendant must show that the government suppressed evidence favorable to him. *See United States v. Ellender*, 947 F.2d 748, 756 (5th Cir. 1991). The prosecution is not obligated to produce evidence or information already known to the defendant, or that could be obtained through the exercise of reasonable diligence. *See Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1997). In the pending case the government argues that defendants were aware of the $45,000 because it originated with O'Brien, and denies that there was any "secret deal" whereby the government consented to use of the $45,000 to pay the restitution order. According to the government, the sentencing judge simply became aware of it and ordered its payment to victims.

Assuming without deciding that the government suppressed evidence, a *Brady* violation only occurs when the government suppresses *material* evidence, including impeachment evidence, favorable to the accused. *See Giglio* 405 U.S. at 154; *Brady*, 373 U.S. at 87. Such evidence is

material if there is a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed. *See United States v. Bagley*, 473 U.S. 667, 682 (1985). *Bagley* established that even a direct, undisclosed payment to a witness is not a reversible per se *Brady* violation, if the court finds under the materiality requirement that the defendant has not shown a reasonable probability that the result of the trial would have been different if the evidence had been disclosed. *See id.* at 671-72, 682.

The district court did not err in denying a new trial based on Donaldson's alleged use of funds from his lawyer's trust account to make restitution. Donaldson told the jury of his conviction and was extensively cross-examined. The jury was well aware that he was testifying in hopes of leniency. Donaldson's credibility on the stand was the subject of *O'Keefe I*. We noted, in reversing an order for new trial, that Donaldson had been subjected to "devastating cross-examination," and that "given the degree of impeachment of Donaldson on the stand, any further impeachment of the type that the defense now desires would merely have been cumulative." 128 F.3d at 896-97. We also noted that "the testimony of Donaldson was overwhelmingly corroborated by other witnesses." *Id.* at 897. For these same reasons, defendants are not now entitled to a new trial on similar grounds. While Donaldson was an important witness, whether he was allowed to pay restitution from a trust account strikes us as a relatively minor matter. Defendants have not shown a reasonable probability that the outcome of the trial would have been different if this evidence had been disclosed.

O'Keefe also complains that the district court erred in denying his request for an evidentiary hearing on the new trial motion. Denial of a hearing on a motion for new trial is reviewed for abuse of discretion. *See United States v. MMM Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992). We see no abuse of discretion. Assuming that O'Keefe's factual allegations regarding this point are entirely accurate, he did not show that he was entitled to a new trial.

O'Keefe separately argues that the prosecution concealed its "active efforts" to hide Donaldson's false statements. While characterizing this claim as one of newly discovered evidence, this argument strikes us at least in part as a rehash of questions raised in *O'Keefe I*, namely, whether Donaldson falsely accused O'Keefe of altering certain corporate minutes and whether the government suppressed its knowledge of the false statement. Our earlier panel has already ruled that Donaldson's false statements did not entitle defendants to a new trial. O'Keefe argues that there was some kind of a secret agreement that the government would not prosecute Donaldson for his perjury, but he offers nothing but conjecture that such an agreement existed.

G. *New Trial Motion Relating to Moore*

O'Keefe argues that after the trial, in civil cases arising out of the liquidation of PNRRG, Moore's counsel filed a statement taking the position that the DOI owed Moore $400,000 in legal fees, and therefore his use of $400,000 of the $527,000 in his trust account was legitimate. The district court denied the motion for new trial based on this alleged newly discovered evidence. At the

trial, defendants cross-examined Moore and he testified that he had taken the position that he had spent the money from the trust account because his legal bills had not been paid. Hence, the evidence was not newly discovered and it came out at the trial. In any event, even if Moore changed his story, and now claims that he stole less PNRRG money than he told the jury, defendants do not show that the alleged newly discovered evidence would probably produce an acquittal. *See United States v. Jaramillo*, 42 F.3d 920, 924 (5th Cir. 1995).

O'Keefe also claims that at trial Moore testified that money in the trust account was BCI's money, while in the later civil proceeding he claimed that the funds belonged to the PNRRG estate. There is trial testimony where Moore stated, on cross-examination, that the money he held in trust belonged to BCI, because it had been transferred to BCI "for me to hold until such time as the accounting was made." So again there is no newly discovered evidence. Further, O'Keefe does not explain convincingly why it matters whether the funds were held in trust for BCI or PNRRG.

This evidence, even if newly discovered, does not change the fundamental facts that Moore admitted he stole money from his trust account with O'Keefe's blessing, and had pleaded guilty to such and was testifying pursuant to a plea agreement. The district court did not abuse its discretion in denying a new trial.

O'Keefe also complains that the district court erred in denying a hearing on this motion, but again, assuming that O'Keefe's factual allegations regarding this point are

accurate, he did not show that he was entitled to a new trial.

H. *Due Process Claim Regarding District Court's Rulings Following Remand*

Schmidt raises a due process argument. As we understand it, he argues first that Fifth Circuit erroneously restricted the district court from considering *Brady* questions which were raised in the district court but were not addressed in the *O'Keefe I* appeal, and argues second that even if the Fifth Circuit did not so err, the district court erroneously interpreting our rulings as prohibiting it from considering these *Brady* questions. The only alleged *Brady* violations about which appellants complain in the pending appeal are discussed above.

We first disagree with any suggestion that our prior rulings prohibited the district court from considering these *Brady* questions. In *O'Keefe I* we remanded the case to the district court for consideration of those grounds for new trial which the district court had not yet reached. 128 F.3d at 899. In a later mandamus proceeding in this court brought by the government, we granted certain mandamus relief, but made clear that our order "does not deal with the motion for new trial based on newly discovered evidence, which is not before this court."

The district court duly ruled on the motions for new trial which were before it after remand. For the reasons explained above, the district court did not err in denying the new trial motions.

I. *Cumulative Error*

O'Keefe argues that the cumulative effect of all the district court's errors warrants reversal. We have recognized that a conviction may be reversed for cumulative errors, regardless of "whether any one of the errors standing alone would be sufficient to justify reversal." *United States v. Riddle*, 103 F.3d 423, 435 (5th Cir. 1997). For the reasons discussed above, O'Keefe has not demonstrated cumulative trial errors which would justify a reversal under the cumulative error doctrine.

J. *Enhancement of O'Brien's Sentence for Special Skills*

O'Brien complains of the sentence enhancement he received for use of a special skill under U.S.S.G. § 3B1.3. This enhancement applies to one who "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." Application note 3 states that a special skill "refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, *accountants*, chemists, and demolition experts."

O'Brien argues that there was no proof that he *used* his special skills "in a manner that significantly facilitated the commission or concealment of the offense" under the guideline. "The government generally must prove factors for enhancement of sentencing by a preponderance of the evidence." *United States v. Canada*, 110 F.3d 260, 263 (5th Cir. 1997). Whether O'Brien used his special skills is a

question of fact. We accept the district court's fact findings regarding sentencing unless they are clearly erroneous. *See* 18 U.S.C. § 3742(e). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *United States v. Krenning*, 93 F.3d 1257, 1269 (5th Cir. 1996). A district court's finding of fact will be deemed clearly erroneous only if we are left with the definite and firm conviction that a mistake has been made. *See United States v. Graves*, 5 F.3d. 1546, 1556 (5th Cir. 1993). This court examines the district court's factual finding regarding sentencing for clear error and affords great deference to the court's application of the guidelines to its factual findings regarding sentencing. *United States v. Snell*, 152 F.3d 345, 346 (5th Cir. 1998).

The enhancement rested on the presentence report (PSR) and the court's finding that O'Brien was a MBA, a CPA, and a certified underwriter with experience in the insurance industry. Initially, the PSR found that O'Brien "used his extensive skills in business, insurance and accounting to facilitate the commission of the offense." In an addendum, the probation officer added that by O'Brien's own admission in a pleading he searched for a stop-gap insurer, worked toward establishing a doctor-controlled pool, rejected certain companies, contacted a broker in the Bahamas and worked Sphere Drake into the agreement. He also testified that he "was in charge of operations" at PNRRG. There was evidence that it was O'Brien who recommended canceling Sphere Drake, and that he drafted or at least worked on the BCI/AIC contract, the secret contract that allowed the defendants to siphon off the "profits" of the BCI/PNRRG reinsurance

agreement. The district court did not clearly err in imposing this sentencing enhancement.

K. *Cross-Appeal on Sentencing*

The government cross-appeals, arguing that the district court erred in failing to find that the victims were particularly vulnerable, and in calculating loss figures used for restitution that were too low.

The government argues that injured patients were vulnerable victims under U.S.S.G. § 3A1.1(b)(1). The district court reasoned that the "victims" were physicians who "were exposed to claims for medical malpractice for which they were not protected by insurance," rather than patients. "The determination that a victim is vulnerable is a factual finding which the district court is best suited to make." *United State v. Burgos*, 137 F.3d 841, 843 (5th Cir. 1998). We see no clear error. Patients became indirect victims of the fraud only if physicians were unable to obtain alternative insurance or cover the losses personally. The district court did not clearly err in concluding, in effect, that it could not hold that the defendants knew or should have known of such an indirect harm to patients. Further, while injured patients are certainly entitled to sympathy, it does not necessarily follow that they are "unusually vulnerable" under the guideline. *See* U.S.S.G. § 3A1.1 n.2.

On the loss calculation issue, the government argues that the district court should not have excluded about $4 million that defendants invested in other insurance companies which ultimately failed. The district court ordered restitution of a little over $1 million from each defendant

other than Schmitz. A district court's order imposing restitution is reviewed for abuse of discretion. *See United States v. St. Gelais*, 952 F.2d 90, 97 (5th Cir. 1992); *see also United States v. Hughey*, 147 F.3d 423, 436 (5th Cir. 1998) ("Once we have determined that an award of restitution is permitted by the appropriate law, we review the propriety of a particular award for an abuse of discretion.").

The district court was concerned that the $4 million did not benefit defendants; it was reinvested in other insurance companies that also failed and were seized by government officials. Schmidt claims, and the government does not dispute, that of the over $5 million that was initially transferred from the O'Keefe trust account to defendants, all of this money was either paid to the federal government in the form of income taxes or was seized by the Louisiana DOI. On this record we cannot say that the district court abused its discretion in limiting restitution as it did.

AFFIRMED.

APPENDIX B

UNITED STATES of America, Plaintiff-Appellant,

v.

Michael O'KEEFE, Sr.; Eric Schmidt; John O'Brien; Gary Bennett; Paul Schmitz, Defendants-Appellees.

No. 96-31181.

United States Court of Appeals, Fifth Circuit.

Nov. 11, 1997.

Stephen A. Higginson, Asst. U.S. Atty., New Orleans, LA, for Plaintiff-Appellant.

Richard T. Simmons, Jr., William Glenn Burns, Hailey, McNamara, Hall, Larmann & Papale, Metairie, LA, for Michael O'Keefe, Sr., Defendant-Appellee.

John R. Martzell, New Orleans, LA, for Eric Schmidt, Defendant-Appellee.

Bruce Charles Ashley, New Orleans, LA, for John O'Brien and Gary Bennett, Defendants-Appellees.

James A. McPherson, New Orleans, LA, for Paul Schmitz, Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, JOLLY and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The United States appeals the district court's order granting a new trial and its denial of the government's

motions for reconsideration of its order granting a new trial and to enforce the recusal of Chief Judge Morey L. Sear following the convictions of Michael O'Keefe, Sr., Eric Schmidt, John O'Brien, Gary Bennett, and Paul Schmitz (collectively "O'Keefe"). We vacate the order granting a new trial and remand to the district court to consider O'Keefe's remaining arguments, as yet unaddressed, for new trial. We deny the government's request to remand this case to a judge outside the Eastern District of Louisiana.

I

We briefly outline the facts of this case insofar as they are relevant to this appeal, largely concerning procedural matters. O'Keefe operated the management company of Physicians National Risk Retention Group ("PNRRG"), a Louisiana medical malpractice insurer, and the other defendants were involved with the company in various capacities. When PNRRG became insolvent and the state of Louisiana moved to have it liquidated, the defendants arranged to have Builders and Contractors Insurance, Limited ("BCI"), a Bahamian corporation run by Charles Donaldson, act as a reinsurer. Various assets of PNRRG were taken out of PNRRG's estate to cover liabilities and claims that were transferred to BCI, and put in the trust account of O'Keefe's law firm on behalf of BCI. Ultimately, a large portion of these assets of PNRRG found their way into the personal bank accounts of the defendants through a complex scheme found by the jury to be fraudulent.

In a series of indictments listing differing factual bases whose relevance we shall discuss later, a grand jury charged O'Keefe and the other defendants with multiple crimes, including conspiracy, wire fraud, mail fraud, and money laundering. The two main government witnesses were Donaldson and Johnny Moore, participants in the scheme. During pre-trial preparation, a Federal Bureau of Investigation ("FBI") 302 report[1] was prepared from the notes of FBI Special Agent Phillips based on a telephone interview between Donaldson, his attorney, government prosecutors, Phillips and other law enforcement personnel. According to the transcribed FBI 302 report of this interview, someone stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract" (the "minutes"). It is unclear who made this statement, but when Donaldson later pled guilty in the U.S. District Court for the Middle District of Louisiana to one count of mail fraud in exchange for his testimony in this case, the prosecutors incorporated this statement into the factual basis of the guilty plea in such a way as to make it appear that Donaldson made the statement.

During the trial against O'Keefe before Chief Judge Sear and immediately prior to Donaldson's direct testimony, the government provided a copy of the FBI 302 report to the defense, pursuant to the Jencks Act, 18

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[1] An FBI 302 report is a typed transcription of the notes of an FBI agent's interview with a witness, usually prepared for testimony of a witness who may be presented at trial.

U.S.C. § 3500 *et. seq.* On direct questioning, the government did not ask any questions concerning the minutes, but when one of the defense attorneys questioned Donaldson about the minutes on cross-examination, Donaldson admitted to accusing O'Keefe falsely of participating in the alteration of the minutes.[2] In a sidebar

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[2] The following colloquy occurred between Simmons, the attorney for O'Keefe, and Donaldson, on cross-examination:

Q: Did you tell anyone that Mr. O'Keefe had created those minutes of December '88 by the addition of the words "five years thereafter."

A: I don't recall. I – I know that I admitted I said that I created – I put them in myself.

Q: That's not my – my question. Let me rephrase it.

A: Did – did I tell anyone that he suggested that? I – I can't recall if I did.

* * *

Q: Since you've started cooperating with the Government, when you're supposed to be truthfully, [sic] have you ever told anyone that Mr. O'Keefe created those minutes of December 1988? And by create I mean adding the five years thereafter?

A: I don't think so. I may have.

Q: You may have?

A: Yes, I can't recall. Was that a clear answer? I can't recall.

Q: You're suggesting that you may have accused him of creating documents that you created?

A: I said I can't recall.

* * *

Q: Isn't it a fact, Mr. Donaldson, that you told the agent that Mr. O'Keefe suggested that the minutes be altered?

conference that followed, the government denied that Donaldson had ever accused O'Keefe of helping to alter the minutes and stated that the FBI 302 report was mistaken if it attributed the statement to Donaldson, an explanation that the court rejected. On redirect, the government half-heartedly attempted to bolster Donaldson's credibility. After Donaldson left the stand, defense counsel moved to strike the testimony of Donaldson, which

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A: (No response)

Q: Didn't you tell the agents that?

A: No, I did not.

Q: Your testimony under oath is that on March 3, 1995, you did not tell Agent Susan Phillips that Mr. O'Keefe suggested that the BCI shareholders minutes be altered to make it appear that Donaldson had authority to enter into the contract; did you make that statement to the F.B.I.?

A: At – I – I did, yes.

Q: And that was a false statement, wasn't it sir?

A: It was a false statement.

Q: And you lied to the FBI, did you not?

A: Yes I did.

Based on this exchange, the court found that Donaldson uttered four possible falsehoods. First, in court on cross-examination, Donaldson falsely accused O'Keefe of participating in altering the minutes. Second, in his guilty plea, Donaldson agreed with the factual basis of the plea, which contained the statement falsely suggesting that O'Keefe participated in the alteration of the minutes. Third, if Donaldson did not previously falsely accuse O'Keefe of participating in the alteration of the minutes, then he uttered a falsehood when he admitted in court that he had accused O'Keefe of participating in the alteration of the minutes. Finally, the court found that Donaldson uttered a falsehood when he stated that the government did not know, prior to trial, that he had lied concerning altering the minutes.

the court refused to do. In closing arguments, the defense highlighted Donaldson's impeachment, and the court included a strong statement admonishing the jury to consider carefully the credibility of witnesses in its jury instructions. Despite Donaldson's testimony and impeachment, the jury convicted O'Keefe and his co-defendants.

After trial, the defense made various post-trial motions, including a motion for new trial. Chief Judge Sear conducted a hearing on the motions at which the parties presented legal arguments but no evidence. The court granted the new trial motion because it found that Donaldson falsely accused O'Keefe of participating in the alteration of the minutes, and that the government knew about the falsehood because the two prosecutors gave inconsistent answers as to whether they learned of the falsehood prior to trial. The court also found that the long, drawn-out pauses before Donaldson answered the defense counsel's questions in the colloquy set out above supported an inference that the government knew about Donaldson's false accusation prior to trial. Several other factors reinforced the court's finding that Donaldson's false testimony warranted a new trial. First, the court found that the government's release of the FBI 302 reports to the defense complied with the Jencks Act, but did not comply with the government's obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Second, another key government witness, Moore, often changed his testimony, which became significant in light of Donaldson's false testimony. Third, the

court found that the prosecution had redrafted the indictment in an attempt to mislead the defense by deleting counts connected to the minutes.

After granting the new trial, Chief Judge Sear disqualified himself from further involvement. This case was then assigned to Judge Mary Ann Vial Lemmon, and the government filed a motion for reconsideration of the order granting new trial ("motion for reconsideration"). Judge Lemmon transferred the case back to Chief Judge Sear, who denied both the government's motion to enforce recusal and the motion for reconsideration. This appeal timely followed.

II

Prior to consideration of the merits, we resolve various challenges to our jurisdiction in this case. These jurisdictional challenges center on the government's notice of appeal, whether Chief Judge Sear appropriately ruled on the motion for reconsideration after his recusal, and if we find that Chief Judge Sear should not have ruled on the motion for reconsideration, whether we must remand to Judge Lemmon to decide the motion for reconsideration.

A

O'Keefe argues that we have no jurisdiction to hear this appeal because the notice of appeal filed by the government fails to comport with the requirements of 18

U.S.C. § 3731, which governs interlocutory appeals by the government from orders granting new trial.[3]

The government's notice of appeal specified the denial of the reconsideration of the order granting new trial and the order mooting all other motions filed by the government, including the government's motion to enforce recusal of Chief Judge Sear. O'Keefe argues that because the government appealed the denial of the reconsideration of the order granting new trial rather than the order granting new trial, § 3731 does not permit jurisdiction over this appeal.

We rejected a similar jurisdictional challenge in *United States v. Greenwood*, 974 F.2d 1449 (5th Cir.1992). In response to the same type of argument raised by O'Keefe, the court stated that

> [a]lthough in form the Government's notice of appeal was from the district court's July 30 denial of the motion to reconsider, in substance the appeal is one from the district court's sentences imposed in the spring of 1991. . . . [S]o long as a notice of appeal puts the other side on notice that the final judgment is the subject of the appeal, a technical defect in the notice of appeal is not fatal (citations omitted).

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[3] 18 U.S.C. § 3731 (1994) provides in relevant part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court . . . granting a new trial after verdict or judgment . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Id.

Greenwood, 974 F.2d at 1467 n. 13 (emphasis in original); *see also* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 203.17[2], at 86-87 (2nd ed. 1996) ("[A]s long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake," the jurisdiction of the appellate court is not barred by mistake in notice of appeal.).

Here, we find that O'Keefe was put on notice by the government's notice of appeal and that he was not prejudiced by the misstatement in the notice of appeal. First, appeal of an order granting new trial can be fairly inferred from a notice appealing denial of reconsideration of that order because the connection between the two is clear and direct. *See Matute v. Procoast Nav. Ltd.*, 928 F.2d 627, 629 (3rd Cir. 1991) (finding link between an order of dismissal and an order denying motion for reconsideration of the order of dismissal to be clear and direct). Moreover, both the government and O'Keefe fully briefed the merits of this appeal, which would imply that O'Keefe was both on notice that the government intended to appeal the order granting new trial and that he was not prejudiced as a result of the misstatement in the government's notice of appeal. *See, e.g., Foman v. Davis*, 371 U.S. 178, 181-82, 83 S. Ct. 227, 229-30, 9 L.Ed.2d 222 (1962); *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1423 (9th Cir. 1989). The order granting new trial and the motion for its reconsideration are also inextricably linked because we cannot analyze whether the district court abused its discretion in denying the motion for reconsideration without considering the merits of the order granting new trial. Thus, as the government's intent to

appeal the order granting new trial can be fairly inferred from its noticing the district court's denial of reconsideration of that order, and as O'Keefe was not prejudiced by the misstatement, the mistake in the notice of appeal does not bar our exercising jurisdiction in this case.[4]

B

The government argues that Judge Sear erred in failing to enforce his recusal and in denying the motion for reconsideration.[5] O'Keefe argues that Chief Judge Sear

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[4] O'Keefe alternatively argues that noticing the motion for reconsideration without mentioning the order granting new trial resulted in the government waiving appeal on the issue of the order granting new trial. A notice of appeal "must designate the judgment, order, or part thereof appealed from." FED.R.APP.P. 3(c). While a policy of liberal interpretation of notices of appeal is the rule when the intent to appeal an unmentioned or mislabeled ruling is clear and no prejudice will result to the opposing party, when only a specified judgment or part thereof is noticed, the notice of appeal is generally strictly construed. *See C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir. 1981). We found above that O'Keefe clearly had notice that the government intended to appeal from the order granting new trial when it appealed from the denial of the reconsideration of that order and that no prejudice would result to O'Keefe because the merits of this case were fully argued in the briefs he presented to this court. Accordingly, we hold that the government did not waive its appeal of the order granting new trial as a result of any defects in its notice of appeal.

[5] Chief Judge Sear stated that

> [b]ecause of the sensitive nature of the court's inquiry concerning conduct of government counsel, the court's personal participation and questioning of counsel in connection with that inquiry, and the

properly refused to enforce the recusal because, quite simply, Judge Lemmon could not reconsider what Judge Lemmon had not considered in the first place.

Once a judge recuses himself from a case, the judge may take no action other than the ministerial acts necessary to transfer the case to another judge, even when recusal is improvidently decided. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457 (5th Cir. 1996) (holding that judge erred in vacating recusal order after recusing herself); *Moody v. Simmons*, 858 F.2d 137, 143 (3rd Cir. 1988) (stating that judge may only perform the "housekeeping" duties necessary to transfer a case to another judge after recusing himself from a proceeding). A ministerial act is usually defined as an act that is essentially clerical and does not involve the exercise of discretion or judgment. *See United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420, 51 S. Ct. 502, 504, 75 L.Ed. 1148 (1931) (describing a ministerial duty as one in which "the obligation to act [is] peremptory, and plainly defined"); *Moody*, 858 F.2d at 143 (holding that orders converting Chapter 11 bankruptcy to Chapter 7 bankruptcy, disqualifying counsel, vacating a contingent fee agreement, and making findings attacking counsel exceeded "housekeeping" orders). A district court necessarily has discretion as to whether to reopen a case in response to a motion for reconsideration. *See*

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findings of the court resulting from that inquiry, the court feels compelled to recuse itself from further handling of this matter in accordance with 28 U.S.C. § 455.

United States v. O'Keefe, No. 96-31181, at 71 (E.D.La. Aug. 15, 1996) (order granting new trial) (hereinafter "Order").

Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990). Thus, when Chief Judge Sear ruled on the motion for reconsideration, he performed a discretionary act, not a ministerial act.

O'Keefe (as Chief Judge Sear noted below) essentially argues that an exception from the bright-line rule for recusals described above should be created for motions for reconsideration because a judge cannot reconsider what that judge has not considered previously. Toward this end, O'Keefe cites *McRae v. United States*, 420 F.2d 1283 (D.C. Cir. 1969), for the proposition that a district court judge cannot reconsider matters previously decided by another district court judge, and that the proper method for resolution of this situation is appeal to a higher court. This argument ignores the many instances in which one district court judge must reconsider an order previously granted by another judge because of the first judge's death, illness, or disqualification. *See TCF Film Corp. v. Gourley*, 240 F.2d 711, 714 (3rd Cir. 1957). It also overlooks the law of the case doctrine, which encompasses situations in which one judge has rendered an order or judgment and the case is then transferred to another judge. *See Abshire v. Seacoast Products*, 668 F.2d 832, 838 (5th Cir. 1982). Under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently. *See Loumar, Inc. v. Smith*, 698 F.2d 759, 762-63 (5th Cir. 1983) (stating that under the law of the case doctrine, a second court should follow a ruling made by an earlier court unless the prior decision

was erroneous, is no longer sound, or would create injustice). Thus, even though Judge Lemmon did not consider the new trial motion initially, Judge Lemmon would have been able to consider the motion for reconsideration and, as such, Chief Judge Sear erred when he ruled on the motion for reconsideration.[6]

C

The "harmless error" standard is used to determine whether orders that a judge issues after the judge has, or should have, recused himself must be vacated. *See Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 862, 108 S. Ct. 2194, 2203, 100 L.Ed.2d 855 (1988); *Doddy*, 101

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[6] We recognize that our ruling today may put one district judge in the somewhat uncomfortable position of having to pass judgment on the discretionary rulings of another judge in the future. However, the values underlying 28 U.S.C. § 455, including "protecting the litigants' constitutional entitlement to an unbiased adjudication and the public's perception of the integrity of the judicial process" demand no less. *See Doddy*, 101 F.3d at 457. Judges have, moreover, under law of the case doctrine experience reviewing the discretionary rulings of other judges, and we are confident that they will be able to carry out any additional duties resulting from our ruling today. A contrary result, we believe, would mean that when a judge has to recuse himself, the parties lose the option of filing a motion for reconsideration, something that we are not inclined to find, both because of the impact on the parties and because reconsideration may obviate the need to appeal. *See Greenwood*, 974 F.2d at 1466. No such problem exists in this case, of course, as we vacate the order granting new trial and only remand for Judge Lemmon to hear O'Keefe's remaining arguments for new trial that Chief Judge Sear declined to decide after he granted a new trial based on the deprivation of due process.

F.3d at 458; *El Fenix de Puerto Rico v. The M/Y JOHANNY*, 36 F.3d 136, 142 (1st Cir. 1994) (concluding that "the need for finality and a common-sense aversion to frittering away scarce judicial resources militate against an inflexible rule invalidating all prior actions of a judge disqualified under § 455(a)"). Under the "harmless error" test, we examine: (1) the risk of injustice to the parties in this particular case, (2) the risk that denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. *See Liljeberg*, 486 U.S. at 864, 108 S. Ct. at 2205; *Doddy*, 101 F.3d at 458. As we explain below, we conclude that it is unnecessary to vacate Chief Judge Sear's ruling and remand for Judge Lemmon to rule on the motion for reconsideration because Chief Judge Sear's ruling on the motion for reconsideration was harmless error.[7]

Applying the three-part harmless error test, we first note that little risk of injustice to the parties will result from not vacating the denial of the motion for reconsideration and remanding for reconsideration by Judge Lemmon. The record is sufficient for us to review the

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[7] Another option is also available: we could hold the appeal in abeyance and remand the motion for reconsideration to Judge Lemmon for her to rule on the motion for reconsideration. In the event that Judge Lemmon vacated the order granting new trial, this appeal would then become moot. Although our decision in *Greenwood* could arguably be read to endorse such an approach, *see Greenwood*, 974 F.2d at 1469, as the record in this case is fully developed, very little would be gained by remanding and waiting for the district court's ruling on reconsideration rather than reviewing the order granting new trial ourselves now.

order granting new trial. Our review of the order granting a new trial and the denial of the motion for reconsideration under an abuse of discretion standard, *United States v. Pankhurst*, 118 F.3d 345, 353 (5th Cir. 1997), is only slightly more deferential than a district court's review under the law of the case doctrine. *See Abshire*, 668 F.2d at 837 (holding that a successor judge should generally treat an order in a case transferred by another judge with deference). Moreover, were we to vacate Chief Judge Sear's order denying the motion for reconsideration, then the motion for reconsideration would still be pending, and we would have to remand for Judge Lemmon to rule on that motion. *See Southland Indus. v. Federal Communications Comm'n*, 99 F.2d 117 (D.C. Cir. 1938) (holding that a decision is not final until an application for reconsideration has been decided). Although the need for an appeal to this court might well be obviated by Judge Lemmon's decision, it is also possible that Judge Lemmon might deny the motion for reconsideration, which would then produce yet another appeal on the merits of the appeal now before us. Further, both the government and O'Keefe have fully discussed the merits of this case in their briefs, which, when considered together with the other facts we adduced above, leads us to conclude that neither party would be prejudiced by our deciding the merits of this appeal without remanding to Judge Lemmon for a ruling on the motion for reconsideration.

Second, our decision today aids, rather than prejudices justice in other cases because it clarifies an unclear area of the law and serves as a caution to district court judges of the importance of taking no discretionary actions after recusal. It was not until 1984 that 18 U.S.C.

§ 3731 was amended to permit the government to appeal the interlocutory grant of a new trial. PUB.L. NO. 98-473, § 1206, 98 Stat. 1986 (1984) (codified at 18 U.S.C. § 3731). *Liljeberg*, which established the three-part harmless error standard for review of decisions made by a judge after recusal becomes appropriate, was not decided until 1988. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988). *Moody*, the first major case concluding that a judge could take no action after recusal other than to perform ministerial acts, was decided in the same year, and we only reached the same conclusion in December of 1996, after Chief Judge Sear had denied the reconsideration motion in this case. *Doddy v. Oxy, USA, Inc.*, 101 F.3d 448 (5th Cir. 1996); *Moody v. Simmons*, 858 F.2d 137 (3rd Cir. 1988). Thus, our decision today aids justice in other cases by alerting judges to the importance of taking no further discretionary actions after recusal.

Finally, there is little risk of undermining the public's confidence in the judicial process. While in some cases vacation of orders issued by a judge will restore public confidence in the legal system, *see United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995), other courts have held that decisions that are based on technicalities and do not reach the merits of the case increase public distrust of the legal system. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988). A pragmatic approach should be taken to the notion of harmless error so that when in doubt, a court can reach the merits of an appeal. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S. Ct.

1502, 1513, 8 L.Ed.2d 510 (1962) (stating that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action' " (quoting FED. R. CIV. P. 1)). Accordingly, we hold that Chief Judge Sear's ruling on the motion for reconsideration after recusal was harmless error and does not have to be vacated. The result of this conclusion is that with all of the challenges to our jurisdiction cleared away, we now proceed to a resolution of this appeal on the merits.

III

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). A *Napue* violation may occur not only when the prosecuting attorney knows that a witness's testimony is false, but also when another government attorney knows of the false testimony and does nothing to correct it. *See Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). False testimony for these purposes includes testimony that affects only the credibility of a witness. *Napue*, 360 U.S. at 269-270, 79 S. Ct. at 1177. Thus, the grant of a new trial based upon a *Napue* violation is proper only if (1) the statements in question are shown to be actually false; (2) the prosecution knew that they were false; and (3) the statements were material. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993).

On appeal, the government argues that none of these three elements exists.

We review an order granting new trial under an abuse of discretion standard. *United States v. Pankhurst*, 118 F.3d 345, 353 (5th Cir. 1997). This standard is necessarily deferential to the trial court because we have only read the record, and have not seen the impact of witnesses on the jury or observed the demeanor of the witnesses ourselves, as has the trial judge. *See United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995). Questions of law, however, are reviewed de novo. *Munn v. Algee*, 924 F.2d 568, 575 (5th Cir. 1991). On mixed questions of law and fact, we review the underlying facts on an abuse of discretion standard, but the conclusions to be drawn from those facts de novo. *Ornelas v. United States*, 517 U.S. 690, ___, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996). The *Napue* test specifically the issue of materiality – is just such a mixed question of law and fact, and so we undertake an independent appellate analysis to determine whether the facts found by the trial court rise to the level of the applicable legal standard.[8]

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[8] As the Supreme Court noted in *Ornelas*, "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles." *Id.* at ___, 116 S. Ct. at 1662. Thus, while perforce we agree with the Seventh Circuit's conclusion in *Boyd* that deference should be given to the district court's finding of facts, we would be remiss in our duty as an appellate court if we did not decide whether those facts satisfied the applicable legal standard. *See also Miller v. Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985) (When the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's

The Supreme Court has recently defined materiality in terms of a "reasonable probability" of a different outcome. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995). Such a reasonable probability results when nondisclosure places the case in a different light so as to undermine confidence in the verdict. *Id.* at 435, 115 S. Ct. at 1566. The relevant inquiry examines the challenged evidence collectively, not on an item-by-item basis. *Id.* at 436, 115 S. Ct. at 1566-67. "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 1893, 114 L.Ed.2d 432 (1991).

It is axiomatic that not every lie is material. Along with other circuits, we have limited material lies to those that occur as a part of the prosecution's case. *See Hudson v. Blackburn*, 601 F.2d 785, 789 (5th Cir. 1979); *see also United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991) (applying same rule). The prosecution has a duty only to "refrain from knowingly presenting perjured testimony and from knowingly failing to disclose 'that testimony used to convict a defendant was false.' " *Aichele*, 941 F.2d at 766 (quoting *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989)). Thus, when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony. *Id.* We have adopted this position because it is the duty of the jury to determine the

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conclusions presumptive force, and in so doing, strip a federal appellate court of its primary function as an expositor of law.").

credibility of the witnesses. *See Little v. Butler*, 848 F.2d 73, 76 (5th Cir. 1988) (stating that "prosecutors are seldom able to vouch for their [accomplice witnesses'] credibility" and that courts should instruct juries to carefully scrutinize the testimony of such witness). Materiality, stated another way, occurs when the falsehood results in "a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976); *United States v. Meinster*, 619 F.2d 1041, 1042 (4th Cir. 1980) (holding that underlying purpose of *Napue* and *Giglio* is not to punish prosecutor for the misdeeds of a witness, but rather to ensure that jury is not misled by any falsehoods).

Not all falsehoods are material partially because of our concern with preserving the adversarial system: it is the prerogative of defense counsel to plan his or her cross-examination strategy, and undue clarification or interruption by the prosecution might interfere with that strategy. *See Mills v. Scully*, 826 F.2d 1192, 1196 (2nd Cir. 1987). Thus, courts have been extremely reluctant to find a deprivation of due process when the prosecution has provided the defense with the necessary information and it can utilize the information, but decides, for tactical reasons, not to use such information. *See United States v. Bethley*, 973 F.2d 396, 399 (5th Cir. 1992) (rejecting claim of *Napue* violation when government provided defendant with witness's rap sheets and plea agreement in related case and defendant's counsel failed to ask question regarding witness's denial of past convictions). However, even when the defense is aware of the falsity of the testimony, a deprivation of due process may result when the information has been provided to the defense but the

government reinforces the falsehood by capitalizing on it in its closing argument, *see United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977), or the defense is unable to utilize the information, *see id.* at 178-79, or when the government thereafter asks misleading questions, *United States v. Barham*, 595 F.2d 231, 243 n. 17 (5th Cir. 1979). Thus, materiality is a method of maintaining the equal playing field between the prosecution and the defense necessary to allow the jury to perform its truth-seeking function.

The trial court concluded that although some of Donaldson's falsehoods were revealed to the jury, the "true nature and scope of Donaldson's perjury was never disclosed or corrected by the government, or revealed on cross-examination by the defendants." Order at 71. The nature and scope of these falsehoods went unrevealed because the government never stated until after trial why it amended the indictment against O'Keefe, why it permitted the cross-examination of Donaldson to go forward with the FBI 302 report that it knew to be incorrect, and why the two prosecutors gave inconsistent answers as to when they learned of the falsehoods. The long, drawn-out pauses before Donaldson answered the defense's questions during the critical cross-examination colloquy also supported the inference that Donaldson had previously told the government about his false accusation of O'Keefe. Further, the court found that the government improperly bolstered the credibility of Donaldson on redirect and during its closing argument by eliciting testimony that even though O'Keefe had not participated in the alteration of the minutes, he had knowingly incorporated them into an affidavit presented to a Louisiana state

court. Finally, the court concluded that the prosecution thought that the testimony concerning the minutes was material because it had changed the indictment in an attempt to cover up the falsehood and to mislead defense counsel. On appeal, the government argues that all of Donaldson's falsehoods were revealed to the jury, and that even if they were not, those falsehoods were not material to the jury's verdict because Donaldson's testimony was overwhelmingly corroborated by other evidence and witnesses.

We first believe that the trial court abused its discretion when it made the factual finding that the government changed the indictments in an attempt to mislead the defense. This factual finding was an abuse of discretion because whether or not the government attempted to mislead the defense, the defense had too much knowledge of the minutes to be misled. The record shows that defense counsel and the government conferred prior to trial regarding the indictment as a result of various pretrial motions made by the defense contesting the statement in an earlier version of the indictment charging that O'Keefe had knowingly included the false minutes in an affidavit he presented to a Louisiana state court. The order granting new trial itself notes that the defense took depositions concerning the minutes and strongly contested the charge in the indictment concerning O'Keefe's knowing incorporation of the minutes into the affidavit. The government sent the defense a letter conceding that Donaldson had altered the minutes by himself.[9]

[9] Affidavits by both government prosecutors in this case and other members of the prosecutorial team state that the

Therefore, this indictment change and the documents provided to the defense, when combined with the FBI 302 report, put defense counsel on notice of possible falsehoods or inconsistencies uttered in the past by Donaldson, even if the defense did not know the precise reason the indictment was changed. As a result, we hold that the district court abused its discretion by finding that the prosecution altered the indictment in an attempt to mislead the defense because even if the prosecution made such an attempt, the defense had too much knowledge of the minutes to be misled.

With respect to the district court's legal conclusion of materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution. Once those falsehoods emerged, the defense had total leeway in cross-examining Donaldson and used the information provided by the prosecution to powerful effect. *See United States v. Adebayo*, 985 F.2d 1333, 1341-42 (7th Cir. 1993) (rejecting *Napue* claim when false testimony was elicited by defense counsel on cross-examination because the false testimony was not part of government's case, defense counsel had total leeway to cross-examine

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indictment was republished to narrow the issues in contention, not to mislead the defense. These affidavits are part of the record on appeal, FED.R.APP.P. 10(a), because they were included with the government's reconsideration motion. In light of Chief Judge Sear's specific refusal to find that the government attorneys either suborned perjury or committed misconduct, these affidavits are one piece of evidence to be considered in deciding whether the government attempted to mislead the defense by republishing the indictment.

witness, and jury instructions included cautionary statement). A review of the cross-examination set out in the margin above gives little doubt that the defense ably exploited the FBI 302 report that the government provided to the defense prior to Donaldson's direct testimony and which provided the basis for the defense's devastating cross-examination of Donaldson. Even if it is contended that the government had a duty to correct any falsehoods made during the course of this cross-examination that were not corrected by the concessions that Donaldson himself made, any attempt by the prosecution to intercede during this cross-examination would have actually harmed the defense by depriving the jury of the full, dramatic effect. *See United States v. Brand*, 80 F.3d 560, 565-66 (1st Cir. 1996) (holding that government had no duty to correct false statement by key witness denying promise of leniency in exchange for testimony because of clarifying admissions by witness in presence of jury). There were also contemporaneous attempts by the government to explain the inconsistencies in Donaldson's testimony during sidebar conferences, although we agree with Chief Judge Sear that those explanations were unsatisfying.

We find that the falsehoods were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations. Defense counsel moved, immediately after Donaldson left the stand, to have his entire testimony stricken from the record, but Chief Judge Sear refused, stating that Donaldson's credibility was for the jury to decide. Defense counsel then made impeachment

of Donaldson the centerpiece of their closing arguments.[10] Chief Judge Sear also included a strong cautionary statement in the jury instructions. Thus, the jury knew that Donaldson had lied either when he stated that he had not previously falsely accused O'Keefe of participating in the alteration of the minutes or when he stated that he had accused O'Keefe of participating in altering the minutes. The jury was also able to evaluate the long, drawn-out pauses before Donaldson answered the defense's questions. *See United States v. Grosz*, 76 F.3d

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[10] The various defense counsel representing the various defendants made the following statements in the course of their closing arguments:

Attorney Ashley: Is it inconceivable, as you sit there, ladies and gentlemen, that after Charles Donaldson lied to this litany of people, including a federal judge, a federal prosecutors, [sic] is it inconceivable that he lied to these folks? . . . No, it's not inconceivable at all.

Attorney Martzell: Mr. Donaldson. I made a little calculation of the legal experience of the people on this side of the bench. I have not included the Judge's years at the bar. Something over 200 years of legal experience sitting out here. I guaranty, [sic] none of us ever have in the past or will have the unique experience that we had here of having a man admit under oath that he falsely accused one of the Defendants and didn't tell the government about it.

Attorney Simmons: And it's been suggested that he didn't lie before you. When you go back there and you can deliberate any way you want, but see if you've been mislead [*sic*] by Mr. Donaldson. What were you [sic] thoughts at the time direct testimony was over? Starting to sound credible? What were your thoughts after cross-examination? Incredible. You were mislead [*sic*]. You were mislead [*sic*] hand-in-hand with the Prosecution. The question is whether they may know about it, but you were mislead [*sic*] by at least Mr. Donaldson.

1318, 1328 (5th Cir. 1996) (stating that sufficient exploration and correction of a falsity by the defense may render the falsehood immaterial by negating reliance on the falsehood by the jury). Accordingly, we find that the disclosure to the jury of Donaldson's falsehoods coupled with the prosecution's disclosures to the defense prevented those falsehoods from being material because enough information was provided to the jury to enable them to adequately perform their fact-finding function and to maintain the level playing field between the prosecution and the defense.[11]

Defense counsel argued in their motion for new trial and before us that they would have proceeded differently, that they would have attempted to impeach the government as well as Donaldson and would have discussed

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[11] This finding that the falsehoods were not material is not negated by the prosecution's half-hearted attempt to bolster the credibility of Donaldson on redirect and in closing arguments. Any such bolstering as may have occurred does not rise to the level of bolstering in cases where we have reversed the denial of a new trial. *See Sanfilippo*, 564 F.2d at 178-79. Moreover, we do not disagree with the trial court's conclusion that the government was aware of Donaldson's falsehoods prior to trial based on the inconsistent answers of the two government prosecutors as to when they were aware that Donaldson had testified falsely. We think that even if the government had such knowledge prior to trial, Donaldson's falsehoods were not material as a matter of law because the falsehoods were fully explored before the jury. Finally, the significance of the long, drawn-out pauses before Donaldson answered O'Keefe's questions during the critical cross-examination colloquy is precisely the kind of issue that the jury can weigh, and should not be a basis for a deprivation of due process based on the government's knowing use of false testimony.

how the factual basis for the guilty plea was selected, had they known the full facts surrounding Donaldson's false testimony at the time. We disagree on several counts. First, the defense repeatedly characterized Donaldson as being completely impeached during its closing arguments. Second, the testimony of Donaldson was overwhelmingly corroborated by other witnesses, and the falsehoods occurred on collateral matters. *See Kopycinski v. Scott*, 64 F.3d 223, 226 (5th Cir. 1995) (holding that when withheld evidence seriously impeaches key witness's testimony on an essential issue, corroborating evidence should be examined to determine materiality of alleged falsehood). Although it is immaterial whether the falsehood concerns an essential element of the government's case or only a collateral matter affecting credibility, *United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979), given the degree of impeachment of Donaldson on the stand, any further impeachment of the type that the defense now desires would merely have been cumulative. *See Guam v. Palomo*, 35 F.3d 368, 372 (9th Cir. 1994) (finding an alleged falsehood nonmaterial when "additional impeachment value gained would have served only to emphasize a fact already established on cross-examination"). Third, although the burden to correct false testimony is on the government, the defense may have waived impeachment of the government by not calling FBI Agent Phillips, the author of the notes on which the FBI 302 report was based and who was present in court at various times. *See Bethley*, 973 F.2d at 399. Finally, Chief Judge Sear indicated that he was prepared to deny the motion for new trial prior to argument on the motion, but the answers of government attorneys at that argument

convinced him otherwise. The affidavits of both government attorneys and other members of the prosecutorial team that the government attached to its motion for reconsideration, in the absence of a finding of prosecutorial misconduct, suggest that the government's answers at the argument of the motion for new trial were inartful but not duplicitous.

A review of cases finding a violation of *Napue* shows that the falsehoods in those cases have usually been far more serious than those that occurred in this case. We have found a violation of *Napue* in cases when there was a material discrepancy between the testimony of government witnesses and defense witnesses, the government was aware that its witnesses committed perjury on the stand but such perjury was not disclosed to the jury, and the credibility of the witnesses was the key to the jury's determination of guilt or innocence. *Barham*, 595 F.2d at 242-43. We reversed because not only was the jury shielded from the fact that the witnesses had committed perjury, but it was also shielded from the fact that the witnesses had attempted to manipulate the jury's decision-making process by creating a false impression. *Id.* at 243. Even in such an apparently egregious situation, we were still loath to grant a new trial. We found that the government had provided defense counsel with a letter disclosing the plea bargains that the witnesses had entered into, but that the counsel had inexcusably overlooked the letters. While such disclosure would normally have been sufficient to prevent a *Napue* violation, the government's posing of misleading questions to the witnesses negated its disclosure, and that created the deprivation of due process. *Id.* at 243 n. 17.

The grant of a new trial is necessarily an extreme measure, because it is not the role of the judge to sit as a thirteenth member of the jury. *See State v. Ladabouche*, 146 Vt. 279, 502 A.2d 852, 856 (1985) (stating that such a formulation would allow the judge to order a retrial when he disagreed with the outcome). The judge's job, in connection with an alleged *Napue* violation, is to grant a new trial when the fact-finding function of the jury has been corrupted by a material falsehood of which the government was aware. Based on the facts of this case, we cannot find that the jury was prevented from performing its essential function. Therefore, we do not find that there is a reasonable probability that the jury would have reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony. As a result, the falsehoods were not material and no *Napue* deprivation of due process occurred.

IV

Although we find that no violation of *Napue* occurred, we will nevertheless uphold the district court's order granting new trial if it is in the "interests of justice." FED.R.CRIM.P. 33. These "interests of justice" may be based on the trial judge's evaluation of witnesses and weighing of the evidence. *See Tibbs v. Florida*, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2215-16, 72 L.Ed.2d 652 (1982). Although grant or denial of the motion is entrusted to the sound discretion of the judge, motions for new trial are not favored, and are granted only with great caution. *United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977). "The remedy of a new trial is rarely used; it is

warranted 'only where there would be a miscarriage of justice' or 'where the evidence preponderates heavily against the verdict.' " *United States v. Andrade*, 94 F.3d 9, 14 (1st Cir. 1996). Chief Judge Sear principally based the grant of new trial on the finding of a violation of *Napue*, but this finding was reinforced by the delayed release of FBI 302 reports (for both Donaldson and Moore) to the defense, the "cloud" cast over the testimony of Moore by the changes in his testimony, and the prosecution's attempt to mislead the defense by changing the indictment. Without the *Napue* violation, we hold that it was an abuse of discretion to grant a new trial based on these findings.

First, the trial court noted that the FBI 302 reports were provided to the defense within the time mandated by the Jencks Act,[12] 18 U.S.C. § 3500 *et seq.*, but stated that it could not "conclusively find that the production of the reports during trial did not adversely affect the court's ability to reach a just conclusion, particularly in light of the government's conduct in connection with the FBI 302 reports of Charles Donaldson." Order, at 54. The argument is not that the government suppressed evidence, *see Brady v. Maryland*, 373 U.S. 83, 85-89, 83 S. Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), but that the disclosure of the reports was so delayed that the defendants were unable to use them effectively at trial and the court's

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[12] The Jencks Act requires the government to produce any statements made by a witness concerning the subject matter on which the witness has testified that are in the possession of the government after the witness has testified on direct examination in a criminal trial prosecuted by the federal government. 18 U.S.C. § 3500(b); FED.R.CRIM.P. 26.2.

ability to reach a just result was impaired. *See United States v. Campagnuolo*, 592 F.2d 852, 861-62 (5th Cir. 1979). When evidence is disclosed at trial in time for it to be put to effective use, a new trial will not be granted "simply because it [the Brady evidence] was not disclosed as early as it might have and, indeed, should have been." *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985). Moreover, even if the disclosure of Brady material was impermissibly delayed, such evidence must still be found to be material. *See Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1567, 131 L.Ed.2d 490 (1995).

In this case, the government submitted the FBI 302 report of Moore to the court for an *in camera* review after cross-examination had begun, following which the court gave the report to the defense. Trial was recessed for the remainder of that day to allow the defense time to prepare. Donaldson's FBI 302 report was turned over to the court for *in camera* review prior to the beginning of his direct testimony, and the court then handed it over to the defense. During the more than one day of Donaldson's testimony, the defense was able to review the testimony. Although turning these reports over to the defense earlier would have certainly avoided the delays during trial, based on our review of the record and the absence of any affirmative finding (other than the conclusion) by Chief Judge Sear that the delayed disclosure of the reports may have impaired O'Keefe's ability to effectively cross-examine Donaldson and Moore, we cannot find that the delayed disclosure of the FBI 302 reports violated Brady. *See Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994); *United States v. Randall*, 887 F.2d 1262, 1269 (5th Cir. 1989);

McKinney, 758 F.2d at 1050. As we have extensively discussed above, O'Keefe's attorneys used Donaldson's FBI report to conduct a devastating cross-examination. Defense counsel were also able to bring out inconsistencies in Moore's testimony as well, although he did not perjure himself. Thus, without viewing the delayed disclosure in the light of a *Napue* violation, we find that this basis for new trial has little merit.

Next, the district court also found that the changes in the testimony of Moore, another key government witness, cast a cloud over his testimony, which, when viewed "in light of the circumstances surrounding Donaldson's testimony," supported the grant of a new trial. However, Chief Judge Sear also found that O'Keefe could not point to any specific instances of perjury by Moore, and that the changes in Moore's testimony provided ample grounds for cross-examination. No violation of *Napue* was alleged in connection with Moore's testimony, and these inconsistencies were explored before the jury on cross-examination. Further, Chief Judge Sear separately considered the inconsistencies in Moore's testimony as the basis for a new trial in another part of the order granting new trial and concluded that the claims of O'Keefe with regard to Moore's testimony lacked merit. Thus, without being viewed in the light of a *Napue* violation, this basis for new trial also has little merit.

Finally, the district court found that the prosecution's attempts to mislead defense counsel by altering the indictment, in light of Donaldson's testimony at trial, supported granting a new trial. We have already discussed the changes in the indictment, and have found that the district court abused its discretion in finding that

the government attempted to mislead the defense by redrafting the indictment because the prominence of the minutes in pretrial proceedings made it impossible for the government to have misled the defense. Thus, this basis for new trial has little merit.

Viewed as a whole, each of these three findings of the court primarily relied upon the finding of a *Napue* violation because each finding was discussed "in light of" the *Napue* violation. Taking away the finding of a violation of *Napue*, we are unable to conclude that the remaining grounds for grant of new trial meet our past standards for grant of new trial or would be in the "interests of justice." Thus, we conclude that Chief Judge Sear abused his discretion in granting a new trial. Accordingly, we vacate the order granting a new trial.[13]

V

When Chief Judge Sear granted the motion for new trial, he declined to address O'Keefe's remaining arguments for new trial, which included arguments based on the government's voluntary dismissal of five counts from the indictment after the government had concluded its case, the alleged "marginal" nature of the evidence, and the cumulative effect of all the grounds asserted in all other defense motions. We accordingly remand to the district court to hear these remaining arguments for new trial.

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[13] In light of our vacation of the order granting new trial, we decline to address arguments concerning whether the grant of new trial should include Schmitz.

The government has suggested that if a remand is needed, the case should be remanded to a judge outside the Eastern District of Louisiana, relying on *United States v. Jordan*, 49 F.3d 152, 159-160 (5th Cir. 1995) (remanding case involving judicial disqualification to district court outside original district). Such a remedy is discretionary, and the exception rather than the rule. *See id.* at 162 n. 21 (Garza, Emilio, J., dissenting). It seeks to avoid placing a district judge's colleagues in the uncomfortable position of passing on her previous rulings. *Id.* at 160 n. 18. In *Jordan*, the judge abused her discretion by failing to recuse herself prior to sentencing the defendant after recusal had become appropriate under § 455(a). *Id.* at 158. Here, we have already vacated the order granting new trial, and Judge Lemmon will only review O'Keefe's remaining arguments for new trial, which does not require her to pass judgment on any of Chief Judge Sear's discretionary rulings. In addition, the law of the case doctrine and general principles of comity serve to respect and preserve the authority of Chief Judge Sear. *See, e.g., Loumar v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983); *Abshire v. Seacoast Prod., Inc.*, 668 F.2d 832, 837 (5th Cir. 1982). Therefore, we remand the case to Judge Lemmon.

For the foregoing reasons, the order granting new trial is VACATED, and the case is REMANDED to Judge Lemmon to hear O'Keefe's remaining arguments for new trial. The government's motion to remand this case to a court outside the Eastern District of Louisiana is DENIED.

APPENDIX C

UNITED STATES OF AMERICA

-VERSUS

MICHAEL O'KEEFE, SR., ERIC SCHMIDT, GARY BENNETT, JOHN O'BRIEN, PAUL SCHMITZ

CRIMINAL ACTION NO. 95-106 SECTION "G"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

August 15, 1996.

MEMORANDUM AND ORDER

Background

On March 30, 1995, following a fairly extensive investigation by the Federal Bureau of Investigation into defendants' management of the liquidated assets of Physicians National Risk Retention Group ("PNRRG"), a grand jury returned a twenty-nine count Indictment against Michael O'Keefe, Sr., Eric Schmidt, John O'Brien, Gary Bennett, and Paul Schmitz. On July 18, 1995, a second grand jury returned a twenty-seven count Superseding Indictment and on February 2, 1996, a third grand jury returned a twenty-three count Second Superseding Indictment.

Count One of the Second Superseding Indictment charged O'Keefe, Schmidt, O'Brien, Bennett and Schmitz with conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. § 371. Specifically, Count One charged the defendants with conspiring to use the mails and interstate and foreign wire communications to execute a scheme to defraud PNRRG, its insured physicians and patients making medical malpractice claims against

those physicians, to obtain money and property by means of false pretenses and representations, and to deprive PNRRG of its right to the honest services of its president. Counts Two through Thirteen alleged various acts of mail and wire fraud in furtherance of the alleged scheme, in violation of 18 U.S.C. §§ 1341 and 1343. Finally, Counts Fourteen through Twenty-three charged O'Keefe, Schmidt, O'Brien and Bennett with money laundering in violation of 18 U.S.C. § 1956 (a) (2) (A). Additionally, the government sought the forfeiture of $5,691,491.40 pursuant to 18 U.S.C. §§ 1956 and 982. As is typical of prosecutions involving a scheme to defraud, the indictment was complex.

Trial commenced on March 4, 1996. Key witnesses for the government included Johnny Moore and Charles Donaldson, both of whom participated in the alleged scheme to defraud, took part in the FBI investigation, and exchanged their testimony[1] for reduced charges[2] and favorable recommendations by the government at sentencing. The government elicited the testimony of several other live witnesses and placed over seventy exhibits in

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[1] Donaldson and Moore also testified before the original grand jury, and the subsequent grand juries were provided with transcripts of their testimony.

[2] On November 10, 1994, in the United States District Court for the Middle District of Louisiana, Moore pled guilty to one count of mail fraud pursuant to a plea agreement. Government Exhibit 42a. on March 27, 1995, in the United States District Court for the Middle District of Louisiana, Donaldson pled guilty to one count of mail fraud pursuant to a plea agreement. Government Exhibit 43a.

evidence. Much time was spent listening to tape recordings of conversations between Michael O'Keefe and Johnny Moore, and between various defendants and the PNRRG Board and others concerning the reinsurance agreement. The defendants, in their case, presented two live witnesses, including defendant John O'Brien, and placed more than thirty exhibits in evidence. In an effort to shorten the trial, the parties stipulated to certain facts and to the testimony of a number of witnesses who were not called to testify.

On March 21, 1996, following approximately three weeks of trial,[3] a jury of twelve persons convicted O'Keefe, Schmidt, O'Brien and Bennett of conspiracy to commit mail and wire fraud as charged in Count One of the Second Superseding Indictment, of the wire and mail fraud offenses charged in Counts Two, Four, Five, Six, Seven, and Eight, and of the money laundering offenses charged in Counts Fourteen through Twenty-three.[4] The jury convicted defendant Paul Schmitz only of the mail

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[3] More than occasional recesses were taken to discuss evidentiary matters and to permit the court and the defense attorneys to review items not previously brought to their attention. For example, various tape recordings and FBI reports (or "302s") were not produced by the government until during or immediately prior to the testimony of several government witnesses. See trial transcript at Vol. 3, p. 18, Vol. 4, p. 58, and Vol. 6, p. 58.

[4] At the end of its case, the government dismissed Counts Three, Nine, Ten, Eleven and Thirteen against all defendants. The jury acquitted defendants O'Keefe, Schmidt, Bennett and O'Brien of Count 12.

fraud offense charged in Count Twelve.[5] Following trial, the parties stipulated the amounts subject to forfeiture and to address the legal issues involved.

The defendants moved for judgments of acquittal at the close of the government's case and renewed their motions at the close of all the evidence. Each time, I deferred ruling on the motions until after trial and, ultimately, afforded the defendants a period of forty-one days in which to prepare written post-trial motions. On May 1, 1996 defendants filed numerous lengthy post-trial motions including: (1) Joint Motion to Dismiss the Second Superseding Indictment; (2) Joint Motion in Arrest of Judgment; (3) Motions for Judgment of Acquittal;[6] (4) Motion of Defendants for New Trial; (5) Joint Motion for An Evidentiary Hearing and In-Camera Review; and (6) Joint Motion for Judgment as a Matter of Law/Motion for Directed Verdict as to the Forfeiture. On May 31, 1996 the government filed oppositions to each defense motion, as well as a Conditional Motion for Reciprocal Discovery and a Motion for Disclosure and Filing Into the Record of the Pretrial Memoranda. Both the defendants and the government filed reply memoranda during the first week of June. Oral argument on the defendants' motions was held on July 31, 1996.

The scheme charged in the indictment and of which the defendants were convicted relates to the defendants'

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[5] The jury acquitted defendant Paul Schmitz of all remaining counts.

[6] Individual motions for judgment of acquittal were filed by O'Keefe, Schmidt and Schmitz. O'Brien and Bennett join in the motions by adoption.

management of the liquidated assets of PNRRG. The evidence showed that PNRRG was formed in 1986 as a Louisiana-licensed risk retention group owned by member physicians and providing medical malpractice insurance for physicians throughout the United States.[7] PNRRG had financial problems from its inception.[8] By 1990, the Louisiana Department of Insurance ("LDOI") began questioning the solvency of PNRRG based on a Peat Marwick audit that showed the company to be statutorily insolvent as of June 1989.[9] PNRRG argued that it was solvent based on a principle referred to as "loss reserve discounting."[10] Hearings were held in 1990 and 1991 to determine the solvency of the company. Attorneys Johnny Moore and Ossie Brown were retained by the DOI to represent it in matters regarding PNRRG.[11]

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[7] Testimony of Dr. Myron Persoff on direct examination by the government, trial transcript at Vol. 5, p. 235.

[8] Testimony of Dr. Persoff on cross-examination by counsel for Michael O'Keefe, trial transcript at Vol. 6, pp. 46-48.

[9] Testimony of Johnny Moore on cross-examination by counsel for Eric Schmidt, trial transcript at Vol. 5, pp. 108-112.

[10] Testimony of Johnny Moore on cross-examination by counsel for Eric Schmidt, trial transcript at Vol. 5, pp. 108-112; trial testimony of Dr. Myron Persoff on direct examination by the government, trial transcript at Vol. 5, p. 237; trial testimony of Dr. Purnell Avery on direct examination by the government, trial transcript at Vol. 7, pp. 72-73.

[11] Testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, pp. 81-82, 86, 194. Ossie Brown primarily handled claims. Testimony of Johnny Moore under cross-examination by counsel for Michael O'Keefe, trial transcript at Vol. 3, p. 62.

In March 1991, PNRRG retained Associated Auditors ("AA"), a company owned by Michael O'Keefe, Sr., to manage PNRRG.[12] The defendants continued to advocate the application of loss reserve discounting, but also began looking into the possibility of a reinsurance agreement.[13] Loss reserve discounting ultimately was disallowed and on August 1, 1991 the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana signed an order placing PNRRG in conservation.[14] The DOI retained an actuarial accountant and a company called Heritage Management to oversee the conservation,[15] and Johnny Moore continued to act as the DOI attorney in connection with PNRRG matters.

By mid- to late-summer 1991, liquidation appeared imminent and defendants O'Keefe, Schmidt, Bennett, and O'Brien began promoting the reinsurance plan in earnest. Johnny Moore and employees of Heritage Management participated in discussions with the four defendants concerning the reinsurance plan,[16] with Michael O'Keefe, Sr.

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[12] Testimony of Dr. Myron Persoff on direct examination by government, trial transcript at Vol. 5, p. 237.

[13] AA was not the first company retained to manage PNRRG, and at least one of the other companies that previously had managed PNRRG also explored the possibility of a reinsurance agreement.

[14] Defense Exhibit 117.

[15] Testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, p. 89-92.

[16] Testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, p. 122.

playing a prominent role in the negotiation of the reinsurance agreement.[17] The appeal of such a reinsurance plan, from the perspective of the DOI, was (1) the continued protection of physicians whose policies would not have expired at the time of liquidation and (2) the reduction to a finite number of those claims that would have to be handled in liquidation.[18] It was agreed that certain claims would remain with the liquidation while others would be covered by the reinsurer(s). After much heated discussion over the amount of assets needed to fund the reinsurance plan, the defendants and the DOI agreed that based on the claims to be covered by the reinsurers, the reinsurers would need more than twice PNRRG's direct unearned premium.[19]

The insurance companies located by the defendants to reinsure the risks were Sphere Drake Insurance PLC ("Sphere Drake"), which was a London-based company, and Builders and Contractors Insurance Limited

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[17] See Government Exhibit 46; testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, p. 125; testimony of Charles Donaldson on direct examination by the government, trial transcript at Vol. 6, pp. 85-87; testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, p. 92.

[18] Testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, pp. 96, 117, 163; testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, p. 94-97.

[19] The figure was 213 percent of the unearned premium, or approximately $15 million. Testimony of Charles Donaldson on direct examination by the government, trial transcript at Vol. 6, pp. 67-68.

("BCI"),[20] which was an Austrian-owned company domiciled in the Bahamas. Dealings with BCI were through Charles Donaldson, a Bahamian insurance broker who, through his company Captive Managers, managed offshore insurance companies.[21] Beginning in 1984, Donaldson managed the self-insurance of an Austrian building contract for BCI.[22] It was through Gary Bennett's acquaintance with Donaldson that Donaldson and BCI came to be involved in the reinsurance plan.[23] The defendants appeared at or participated by telephone in various PNRRG Board meetings in 1991 to advise the PNRRG Board and to promote the reinsurance agreement.[24] Significant pressure was placed on the Board by both the defendants and the DOI to agree to the reinsurance plan.[25] The reinsurance agreement was presented, in general, as a sort of "lifeboat" (PNRRG in liquidation being the "sinking ship") for the physicians until they were able to go forward with other insurance or form a new risk retention group.[26] The defendants also promoted the plan

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[20] Testimony of Charles Donaldson on direct examination by the government, trial tarnscript at Vol. 6, pp. 67-68.

[21] Testimony of Charles Donaldson on direct examination by the government, trial transcript at Vol. 6, pp. 64-67.

[22] Testimony of Charles Donaldson on direct examination by the government, trial transcript at Vol. 6, pp. 64-67.

[23] Testimony of Charles Donaldson on direct examination by the government, trial transcript at Vol. 6, pp. 70-71; Government Exhibit 28a, p. 10.

[24] Government Exhibits 26a, 27a and 46.

[25] Government Exhibit 27a, at pp. 66-74.

[26] Government Exhibits 26a at p. 12; 27a at pp. 98-99.

to insurance agents who had placed physicians with PNRRG.[27]

On October 18, 1991, PNRRG entered into a reinsurance agreement whereby BCI would assume a small portion of the risk and cede the bulk of the risk to Sphere Drake.[28] Reinsurance coverage was to be provided for all medical malpractice claims arising out of PNRRG insurance policies written with inception dates of September 1, 1990 and thereafter, and for which claim files had not been opened prior to October 1, 1991.[29] Pursuant to the ratio approved by the DOI representatives, approximately $15 million in assets was to be transferred to the reinsurer.[30] On the same date, Associated Insurance Consultants, Inc. ("AIC"), a company operated by the defendants, entered an agreement with BCI providing that AIC was to act as BCI's agent and representative in supervising and effectuating the reinsurance agreement between PNRRG and BCI in return for 90 percent of the profits.[31] On November 12, 1991 the Nineteenth Judicial District Court for East Baton Rouge Parish, Louisiana, signed an order placing PNRRG in liquidation.[32] In conjunction with the reinsurance agreement and liquidation, approximately $10 million in cash was transferred to the O'Keefe

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[27] Government Exhibits 28 and 28a.

[28] Government Exhibits 1 and 1a.

[29] As a result of reunderwriting, approximately 400 physicians were cancelled early on as poor risks. *See* Government Exhibit 28a.

[30] *Id.*

[31] *See* Government Exhibits 24 and 25.

[32] Defense Exhibit 117.

trust account.[33] It is the defendants' management of these funds that was at issue in these proceedings.

Discussion

I. Joint Motion to Dismiss the Second Superseding Indictment

A. The Motion

The defendants seek dismissal of the Second Superseding Indictment because "the manner in which the prosecution obtained [it] represented such a serious threat to the integrity of the judicial process that the [court] should dismiss the Indictment as a proper exercise of its supervisory power." The defendants point to seven defects and/or circumstances which they believe justify dismissal of the Second Superseding Indictment: (1) the perjury of Charles Donaldson; (2) the false accusations that Donaldson made to the investigators; (3) the in-court acknowledgment by the government of Johnny Moore's lack of credibility; (4) the deletions from the original indictment; (5) the deletions from the superseding indictment; (6) the absence of live testimony before the grand jury that returned the Second Superseding Indictment; and (7) the fact that different grand juries returned the several indictments. The defendants seek dismissal of the indictment on these grounds for the first time following trial.

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[33] Testimony of Anthony J. Alessi on direct examination by the government, trial transcript at Vol. 9, p. 49; Government exhibits 1c, 1c-1, 1d, 1d-1, 1e, and 1e-1.

In conjunction with the motion to dismiss, the defendants ask the court to conduct an *in camera* inspection of the grand jury minutes and/or an evidentiary hearing concerning the events that transpired before the grand jury to determine whether the manner in which the prosecution obtained the Second Superseding Indictment requires that it be dismissed. The government opposes the defendants' motion to dismiss the Second Superseding Indictment on grounds that the motion is untimely and fails to state a legal basis for dismissal. The government also opposes disclosure and/or *in camera* inspection of the grand jury proceedings on grounds that defendants have not made the necessary showing under the law to entitle them to such disclosure.

B. Timeliness of the Challenge

Under Federal Rule of Criminal Procedure 12, motions to dismiss an indictment must be made prior to trial or they are waived. Fed. R. Crim. P. 12(b)(2). Rule 12 further provides that a defendant's failure to raise such an objection prior to trial results in a waiver of the objection, but allows the court to exercise its discretion in granting relief from waiver on a showing of good cause. Fed. R. Crim. P. 12(f). It is the moving party's burden to establish good cause, and relief from waiver is rarely granted. C. Wright, *Federal Practice & Procedure*, Crim. 2d § 193, p. 698.

The government maintains that because each of the seven defects cited by the defendants involves matters defendants actually knew or could have discovered "through the exercise of reasonable diligence" prior to

trial, the defendants have not demonstrated good cause under Fed. R. Crim. P. 12 (f). *United States v. Jennings*, 991 F.2d 725, 730 (11th Cir. 1993). The defendants opine that "[because] the determination that a witness for the Government had committed perjury was not made until trial, . . . good cause has been shown which will allow the Court to grant relief from the waiver of Rule. 12(b) via Rule 12 (f)."[34] The defendants obviously refer to the perjury committed by Charles Donaldson.[35] It is difficult to see how Donaldson's perjury at trial – defendants' sole explanation for waiting until after trial to file this motion to dismiss – explains their delay in asserting any of the seven alleged errors other than the first two. Review of each of the asserted bases for dismissal of the indictment reveals the incongruity.

With regard to alleged defects (4) and (5), "the deletions from the original and superseding indictment," the defendants do not identify the specific deletions to which they refer. Any differences in the indictments were apparent on the face of the Second Superseding Indictment. Indeed, the defendants relied on numerous alleged

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[34] Memorandum in Support of Joint Motion to Dismiss Indictment, Record Doc. No. 288, at p. 1. Defendants also cite a Sixth Circuit case for the principle that a claim of prosecutorial misconduct before a grand jury is "*only* reviewable after trial." *United States v. Short*, 671 F.2d 178, 188 (6th Cir. 1982), *cert. denied*, 457 U.S. 1119, 73 L. Ed. 2d 1332, 102 S. Ct. 2932 (1982) (emphasis added). As the government points out, however, the *Short* decision addressed the non-appealability of a pre-trial denial of a motion to dismiss the indictment pending final judgment; it did not involve a post-trial motion to dismiss an indictment.

[35] *See* discussion *infra* at Section V (B).

changes in the indictment as a basis for a motion to continue the March 4, 1996 trial.[36] Thus, it is clear that defendants knew or should have known of these alleged defects prior to trial.

With regard to alleged defect (6), the absence of live testimony during the third grand jury proceeding, the defendants were provided in advance of trial with transcripts of Donaldson's and Moore's testimony before the first grand jury, and were at no time provided with any testimony[*] before the second and third grand juries. The defendants thus knew or should have known prior to trial that the third grand jury did not hear those witnesses' live testimony.

Finally, with regard to alleged defect (7), the use of different grand juries, the foreman's signatures on the various indictments were different and, therefore, the defendants knew or had reason to know of this alleged defect prior to trial.

With regard to alleged defect (3), "the in-court acknowledgement by the Government of the lack of credibility of Johnny Moore," as an initial matter I have a difficult time understanding this objection to the indictment. The defendants have not alleged that any part of Moore's grand jury testimony was perjured. Their objection, as I understand it, is that the government's reaction to Moore's testimony before the petit jury should be viewed as an admission of his lack of credibility and, therefore, the government should have provided the third grand jury with exculpatory material related to Moore's

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[36] *See* Joint Motion to Continue Trial, Record Doc. No. 201.

testimony and/or should have advised the grand jury that Moore was not the most credible witness.[37] Regardless of the merits of this argument, which I address below, the defendants obviously could not have known until trial how the government would "react" to the testimony of Johnny Moore in court.

With respect to alleged defects (1) and (2), the defendants express suspicion that Donaldson's March 16, 1995 grand jury testimony was perjured:

> Because of Charles Donaldson's admitted perjury, not only at the trial, but also before the District Court in Baton Rouge, Donaldson's admission that he had 'falsely accused' the defendant Michael O'Keefe, and the substantial lies of Donaldson to the investigating agents, there exists strong evidence that the Grand Jury which returned the Second Superseding Indictment was presented perjurious testimony.[38]

The defendants do not cite any specific portions of the grand jury testimony in their memorandum in support of their motion to dismiss the indictment. However, in a reply memorandum addressing their motion for new trial, the defendants contend that the testimony of Donaldson before the grand jury was misleading as to the date on which Donaldson created the forged minutes, and thus sought to implicate O'Keefe in their creation.[39]

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[37] The third grand jury considered only the transcript of Moore's prior grand jury testimony.

[38] Memorandum in Support of Joint Motion to Dismiss the Second Superseding Indictment, Record Doc. No. 288, at p. 2.

[39] Motion for Leave, Record Doc. No. 308, at pp. 4-5.

The government maintains that even assuming alleged violations (1) and (2) have merit, the defendants waived them by failing to raise them prior to trial. Although the government has not had an opportunity to review the defendants' pretrial memorandum, it asks the court to consider that memorandum in discerning whether the defendants had any concerns about Donaldson's testimony prior to trial that should have compelled them to act in a more timely manner in seeking dismissal of the indictment.[40] I have reviewed Donaldson's grand jury testimony, defendants' pretrial memorandum, and other record documents. The defendants took depositions on the issue of the altered BCI minutes and vehemently contested a charge in the indictment related to an affidavit that incorporated the minutes. By their own admission, prior to trial the defendants had access to the transcript of Donaldson's grand jury testimony and the deposition testimony that revealed when the minutes were altered. Indeed, when the government secured a Second Superseding indictment that deleted the overt act concerning the false affidavit, the defendants voiced their concerns to the court about the government's motivation for the change(s) to the indictment. Nevertheless, they

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[40] The government has not seen the defendants' pretrial memorandum because the defendants requested that the parties' pretrial memoranda not be exchanged or placed in the record. The government has filed a separate motion seeking disclosure of the defendants' pretrial memorandum. The defendants object to disclosure of the memorandum, but do not object to the court's review and/or citation of any portion of the memorandum. *See* Opposition of the Defendants to the Motion for Disclosure and Filing into the Record of the Pre-Trial Memoranda, Record Doc. No. 313.

waited until after trial to raise any challenge to the indictment based on suspicions that Donaldson perjured himself before the grand jury. I find that the defendants' post-trial challenge to the indictment based on the alleged misleading nature of Donaldson's testimony is untimely.

C. The Court's Supervisory Power

Even assuming the moving party is able to establish good cause for a delay in seeking dismissal of an indictment, a federal court is limited in its authority to dismiss an indictment based on allegations of prosecutorial misconduct in the grand jury process. The Fifth Circuit has held that "even in the case of the most egregious prosecutorial misconduct, an indictment may be dismissed only upon a showing of actual prejudice to the accused, and an indictment will be dismissed only if prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury." *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982). Other circuits likewise have recognized that dismissal of an indictment "is an extreme remedy, appropriate only in cases of 'serious and blatant prosecutorial misconduct that distorts the integrity of the judicial process.' " *United States v. Giorgi*, 840 F.2d 1022, 1030 (1st Cir. 1988).

Most important to this court's analysis are those cases in which the Supreme Court has addressed the supervisory power of federal courts. The Supreme Court has held that the supervisory power may be used to dismiss an indictment because of misconduct in the grand jury proceedings only where that conduct amounts

to a violation of one of those "few clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions."[41] *United States v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 1741, 118 L. Ed. 2d 352 (1992) (*citing United States v. Mechanik*, 475 U.S. 66, 106 S. Ct. 938, 943, 89 L. Ed. 2d 50 (1986)). The purposes underlying the supervisory power are threefold: to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations, and to deter illegal conduct. *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96 (1983) (citations omitted).

Although the supervisory power may be used to enforce or vindicate legally compelled standards of prosecutorial conduct before the grand jury, it may not be used to prescribe those standards in the first instance. *Williams*, 112 S. Ct. at 1742. For example, the *Williams* Court held that a district court may not dismiss an otherwise valid indictment on grounds that the government failed to disclose to the grand jury substantial exculpatory evidence the government had in its possession. *Id.* at 1745. The *Williams* Court located no rule or statute which

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[41] As examples of "clear rules," the *Williams* Court cites Rule 6 of the Federal Rules of Criminal Procedure and additional standards of behavior set forth in the United States Code. *See* 18 U.S.C. §§ 6002, 6003 (setting forth procedures for granting a witness immunity from prosecution); § 1623 (criminalizing false declarations before grand jury); § 2515 (prohibiting grand jury use of unlawfully intercepted wire or oral communications); § 1622 (criminalizing subornation of perjury).

required such disclosure, and held that the lower court was prohibited from using its supervisory authority to prescribe such a duty in view of the grand jury's functional independence from the judicial branch and the longstanding rejection of challenges to the reliability or competence of the evidence presented to a grand jury. *Id.* at 1745-1746 (*citing United States v. Costello*, 350 U.S. 359, 76 S. Ct. 406, 409, 100 L. Ed. 397 (1956)).

The Supreme Court has further held that in exercising its supervisory role to dismiss an indictment for errors in grand jury proceedings, a federal court may not dismiss an indictment without conducting the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). *United States v. Bank of Nova Scotia*, 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988); *United States v. Mechanik*, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986). That is, an indictment may not be dismissed for errors in grand jury proceedings absent a showing that such errors actually prejudiced the defendant. *Bank of Nova Scotia*, 108 S. Ct. at 2373.[42] The Court has recognized that in very rare cases the structural protections of the grand jury may be so undermined that the proceedings

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[42] Under the harmless-error test, when a motion to dismiss an indictment is not made until after trial, a petit jury's verdict may render harmless any conceivable error in the charging decision that might have flowed from the alleged violations in the indictment process, even if prosecutorial misconduct actually occurred and in spite of the defendant's diligence in seeking to discover the basis for the claimed misconduct. *United States v. Mechanik*, 106 S. Ct. at 943

are fundamentally unfair; in such cases, the nature of the violation itself allows a presumption of prejudice.[43]

As previously noted, the defendants object to the indictment based on seven specific defects. The defendants do not, however, frame their motion in terms of the violation of "clear rules which were carefully drafted and approved by [the Supreme] Court and by Congress to ensure the integrity of the grand jury's functions," as required by *United States v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). 112 S. Ct. at 1741. Indeed, the defendants cite absolutely no rules of criminal procedure or statutes related to the grand jury process.[44] Moreover, the few cases that the defendants cite and discuss (generically) in their memorandum all must necessarily be reexamined in light of the more recent Supreme Court decisions in *Mechanik*, *Bank of Nova Scotia*, and *Williams*. Defendants neither cite nor reference any of these Supreme Court cases. This alone justifies rejection of the defendants' motion to the extent that it is premised on the supervisory power of this court.

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[43] The Court cites cases involving racial and gender discrimination in the selection of grand jurors as examples. *Id.* at 2375.

[44] The defendants do not suggest, and neither do I find, that the alleged violations were such as would undermine the structural protections of the grand jury process in a manner that rendered it fundamentally unfair, creating a presumption of prejudice. *See, e.g., United States v. Sitton*, 968 F.2d 947, 954 (9th Cir.), *cert. denied*, 507 U.S. 929, 122 L. Ed. 2d 695, 113 S. Ct. 1306 (1992) (presentation of perjured testimony to grand jury is not structural flaw which supports presumption of prejudice).

The defendants' objection to the government's failure to provide the grand jury with exculpatory evidence on Johnny Moore clearly lacks merit. The Supreme Court, in *United States v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992), held that prosecutors are not required to disclose and the grand jury is not obligated to consider exculpatory evidence. To require such disclosure "would alter the grand jury's historical role, transforming it from an accusatory body that sits to assess whether there is adequate basis for bringing a criminal charge into an adjudicatory body that sits to determine guilt or innocence." *Id.* at 1736.

Likewise, although I already have found a lack of cause excusing the defendants' delay in making objections (4) through (7), even assuming good cause for the delay these objections lack legal merit. Essentially, they are a challenge to the manner in which evidence was presented to the grand jury and/or the sufficiency of that evidence. There is a strong presumption of regularity accorded to the findings of grand juries, and an indictment, regular on its face, returned by a legally constituted grand jury, is presumed to be founded on competent evidence. *Costello v. United States*, 350 U.S. 359, 363, 76 S. Ct. 406, 409, 100 L. Ed. 397 (1956); *United States v. Chagra*, 669 F.2d 241, 247-248 (5th Cir.), *cert. denied*, 459 U.S. 846, 74 L. Ed. 2d 92, 103 S. Ct. 102 (1982). No new statutory violations were charged in the Second Superseding Indictment, and the fact that different grand juries returned the various indictments is not legally significant.

Finally, although I have found a lack of cause excusing the defendants' delay in making objections (1) and

(2), even assuming good cause for the delay these objections also lack legal merit. The defendants' argument on this issue is not a model of clarity. The defendants' memorandum supporting their motion to dismiss the indictment does not cite a single section of the prior grand jury testimony wherein the alleged perjury occurred. However, in a reply memorandum addressing their motion for new trial, they contend that the testimony of Donaldson before the grand jury is false and misleading as to the time at which Donaldson 'created' the forged minutes, thus implicating *O'Keefe In* their creation.

The defendants have extracted less than a page of Donaldson's grand jury testimony in support of their argument that the testimony was perjured:[45]

Q: Now in connection with those conversations back and forth with O'Keefe on preparing the affidavit

A: Yeah

. . .

Q: When everything came about as far as the litigation in the United States, did you obtain some minutes dated December 19, 1988 from Builders and Contractors?

A: Yes

. . .

Q: And you sent that at his (O'Keefe's) direction to the court in Louisiana?

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[45] *See* Joint Response to the Government's Memoranda in Opposition to the Defendant's Post-Trial Motions, Record Doc. No. 309, at pp. 4-5.

A: Yes.

The defendants maintain that "the entire thrust of this quotation informs the grand jury that in connection with the preparation for affidavits with Mr. O'Keefe (i.e., "when everything came about as far as the litigation"), Donaldson in collusion with O'Keefe altered the [BCI minutes]" when, in fact, "the 'litigation' in this case did not occur until 1994 . . . and Donaldson now has admitted to altering the [minutes] at least prior to his August 9, 1993 telefax to Price Waterhouse, months before any litigation."[46]

I have reviewed the entirety of Donaldson's March 16, 1995 grand jury testimony on the issue, which is significantly longer than the portion extracted by the defendants.[47] Some of the government's questions to Donaldson are less than clear. Nevertheless, Donaldson did not testify that O'Keefe was the one who had altered the BCI minutes, the subject on which Donaldson subsequently perjured himself at the Rule 11 proceedings and on the witness stand at this trial. Neither is the reference to "when everything came about as far as the litigation in the United States" misleading. Contrary to the defendants' present assertion that the litigation referred to in the government's question did not commence until 1994, the civil litigation was going on prior to and during 1993, a fact which is admitted by the defendants' [sic] in their

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[46] Joint Response to the Government's Memoranda in Opposition to the Defendant's Post-Trial Motions, Record Doc. No. 309, at p. 5.

[47] *See* Attachment to the Government's Memorandum in Opposition to Defendants' Motion for New Trial.

pretrial memorandum.[48] The defendants' charge of perjury before the grand jury must fail, inasmuch as a charge of perjury may not be made based on a statement lifted out of context, the true meaning of which has thereby been perverted.[49]

The defendants further maintain that the government had access to the FBI report containing a false accusation against O'Keefe but did not alert the grand jury of the falsity of the allegation, thus "misleading the Grand Jury in its belief in the credibility of the witness."[50] To the extent that the defendants argue that the government should have provided the grand jury with the FBI report or advised them of its existence, or should have alerted the grand jury to Donaldson's credibility problems, the argument clearly lacks merit under *Williams* which, as discussed herein above, precludes the imposition of a duty on the government to disclose exculpatory information to the grand jury. *Williams*, 112 S. Ct. at 1736.

Accordingly, the defendants' motion to dismiss the Second Superseding Indictment fails on all grounds. Furthermore, review of the grand jury minutes is not necessary for purposes of ruling on this motion. In view of the defendants' arguments and the controlling legal principles, the evidence submitted for my review is adequate and review of the grand jury minutes would add nothing to my analysis.

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[48] Defendants' Pretrial Memorandum, at pp. 17, 31.

[49] *See, e.g., United States v. Clifford*, 426 F. Supp. 696 (S.D.N.Y. 1976).

[50] Memorandum in Support of Motion to Dismiss, Record Doc. No. 288 at p. 7.

II. Joint Motion in Arrest of Judgment

A. The Motion

The defendants move, pursuant to Federal Rule of Criminal Procedure 34, for an order in arrest of judgment based upon (1) the failure of the indictment to charge an offense and (2) the McCarron-Ferguson Act.[51] The government opposes the motion as untimely and lacking in merit.

B. Standard Applicable to Motion in Arrest of Judgment

A motion in arrest of judgment pursuant to Rule 34 is a rarely used, and even more rarely granted, motion. C. Wright, *Fed. Prac. & Proc., Crim.* § 571. There are only two grounds on which a Rule 34 motion may be premised: (1) the indictment or information does not charge an offense; and/or (2) the court is without jurisdiction. Fed. R. Crim. Proc. 34. A motion under Rule 34 is decided on the "record," and thus includes only the indictment, the plea, the verdict and the sentence; the evidence adduced at trial is not relevant. *United States v. Sisson*, 399 U.S. 267,

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[51] Rule 34 requires that a motion in arrest of judgment be made within seven days after verdict or within such further time as the court may fix during the seven day period. Defendants at no time within the seven days following the verdict alerted the court that they anticipated filing such a motion. Nonetheless, because I afforded defendants over one month to file "post-trial" motions, I give them the benefit of the doubt and assume that they understood this to refer to any post-trial motion they could possibly assert. *See* Record Doc. No. 268.

90 S. Ct. 2117, 2125, 26 L. Ed. 2d 608 (1970); *Fed. Prac. & Proc., Crim* § 571, at p. 373.

c. Analysis

The defendants argue that the indictment fails to provide a "fair indication of the nature or character of the scheme or artifice [to defraud], or the false pretenses, misrepresentations or promises forming a part of it" because the indictment does not advise how each of the alleged representations are false. The government opposes this challenge as untimely, as selectively relying only on certain parts of the indictment while ignoring the indictment as a whole, and as improperly relying on evidence adduced at trial.

The presence of defects in the form of the indictment is not the same as an attack on the substance of the indictment and is an insufficient ground for arresting judgment; such an attack must be made before trial by a Rule 12 (b) motion. *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir.), *cert. denied* 450 U.S. 910, 67 L. Ed. 2d 334, 101 S. Ct. 1348 (1981); *United States v. Varner*, 437 F.2d 1195, 1197 (5th Cir.), *cert. denied* 404 U.S. 825, 30 L. Ed. 2d 52, 92 S. Ct. 52 (1971). An attack on the failure of an indictment to satisfy the specificity required by a statute, the Federal Rules of Criminal Procedure, or the Constitution is an attack on the form, not the substance, of an indictment; such an attack will not be entertained after trial unless the indictment "is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." *United States v. Watkins*, 709 F.2d 475, 478 (7th Cir. 1983).

The defendants' attack on the indictment with regard to the failure to charge how the alleged representations were false addresses the specificity of the indictment and therefore is a challenge to the form, not the substance, of the indictment. Although I have made disparaging comments about the Second Superseding Indictment in the past, my review [sic] the document as a whole and without any reference to the evidence does not reveal it to be so defective that it does not, "by any reasonable construction, charge an offense for which the defendants were convicted." Simply because it lacked the specificity desired by defendants does not provide a basis for a post-trial arrest of the judgment.

The defendants' alternative ground for arrest of judgment is that in view of the evidence adduced at trial, under the McCarron-Ferguson Act the indictment fails to charge an offense. Defendants improperly rely on evidence admitted at trial. It is clear under the law that I am precluded from considering anything beyond the record to decide a motion in arrest of judgment. I previously addressed defendants' McCarron-Ferguson Act argument on the record in connection with defendants' pretrial motion to dismiss the indictment, and found by Memorandum and Order dated September 26, 1995 that the Act did not apply so as to preclude prosecution of defendants. I stand by my analysis therein and reject the defendants' repetition of the same argument after trial.

Accordingly, for the foregoing reasons, defendants' motion in arrest of judgment is denied.

III. O'Keefe, Schmidt, O'Brien and Bennett's Motion for Judgment of Acquittal

A. The Motion

Defendants O'Keefe, Schmidt, Bennett and O'Brien[52] contend that the evidence was insufficient to support their conviction on any count of the indictment because there is no evidence on which a reasonable jury could have concluded that there was a scheme to defraud as described in the indictment.[53] The government opposes the motions on grounds that the defendants rely on legal theories contrary to controlling precedent and factual theories that the jury was free to disbelieve.

B. Standard for Deciding Rule 29 Motion

In challenging the sufficiency of the evidence a defendant "faces an imposing standard of review." *United States v. Parekh*, 926 F.2d 402, 405 (5th Cir. 1991). I must determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the government, and giving the government the benefit of all credibility choices, a rational jury could have found the essential elements of the crime proven beyond a reasonable doubt. *Glasser v. United States*, 315

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[52] Separate motions were filed on behalf of O'Keefe and Schmidt, with Bennett and O'Brien joining in those motions by adoption.

[53] Defendants properly preserved their Rule 29 motion by moving for a judgment of acquittal at the end of the government's case and again after the close of defendants' case. I deferred ruling on the motion until after the jury returned a verdict.

U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942); *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994). I determine not what *I* might conclude as a trier of fact, but what a *reasonable jury* could conclude. *United States v. Alonzo*, 681 F.2d 997 (5th Cir. 1982). A jury is free to choose among all reasonable constructions of the evidence. *United States v. Pennington*, 20 F.3d at 597. I may not assess the credibility of witnesses, weigh the evidence or draw any factual inferences from the evidence; these are the functions of the jury alone. *United States v. Barrilleaux*, 746 F.2d 254, 256 (5th Cir. 1984).

C. "Scheme to Defraud"

The defendants argue that the government failed to prove a scheme to defraud because it failed to prove that the defendants made any "false or fraudulent pretenses, representations or promises" as described in the indictment and/or to the victims listed in the indictment. According to the defendants, the only representations that the government proved at trial related to true events, occurrences and intentions, that is, to things that either came to pass or that were never shown to be false by contrary evidence. The defendants maintain that "what the Government must prove is at least one misrepresentation and that the Government has failed to do."[54] Pursuant to this legal theory, the defendants then devote substantial effort to demonstrating the truth of each of

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[54] Joint Response to the Government's Memoranda in Opposition to the Defendant's Post-Trial Motions, Record Doc. No. 309, at p. 14.

the statements they made in connection with the PNRRG reinsurance agreement.

The defendants' Rule 29 argument is premised on an inaccurate conception of the law. The essential elements of mail and wire fraud are (1) the formation of a scheme or artifice to defraud, (2) the use of mail or interstate wire communications in furtherance of the scheme, and (3) the defendant's specific intent to commit fraud.[55] With respect to the first element – the "scheme to defraud" – the statutes refer to "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343 (emphasis added). Based on this language, courts have construed the statutes to forbid both schemes to defraud, whether or not any specific misrepresentations are involved, and schemes to obtain money or property by means of false pretenses, promises or representations. *United States v. Clausen*, 792 F.2d 102, 105 (5th Cir.), *cert. denied* 479 U.S. 858, 93 L. Ed. 2d 133, 107 S. Ct. 202 (1986) (citations omitted). A third variety of fraudulent scheme recognized under the statutes is a

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[55] The defendants do not attack the jury's finding of a conspiracy among the defendants, with the exception of a single sentence contained in the conclusion of Eric Schmidt's motion which summarily challenges the jury's finding that Schmidt joined the conspiracy. Neither do the defendants attack the jury's findings on the money laundering counts, except to the extent that the law requires that the alleged money laundering must have been in furtherance of the allegedly unproven "scheme to defraud."

scheme to deprive another of the intangible right of honest services. *See* 18 U.S.C. § 1346; *United States v. Richerson*, 833 F.2d 1147, 1156 (5th Cir. 1987).[56]

The term "scheme to defraud" is broad in scope. *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (citations omitted). "The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity." *Id.* Essentially, a scheme to defraud is measured by a non-technical standard and is "a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *United States v. Bruce*, 488 F.2d 1224, 1229 (5th Cir.), *cert. denied* 419 U.S. 825, 42 L. Ed. 2d 48, 95 S. Ct. 41 (1974). The scheme need not be fraudulent on its face or misrepresent any material fact. Although misrepresentations are "the most base form of deceit," it is just as unlawful to speak half-truths or to omit facts which are necessary to prevent statements from being misleading in light of the circumstances in which they are made. *Id. United States v. Townley*, 665 F.2d 579, 584 (5th Cir. 1982). All that is necessary is that there be a "scheme" that is reasonably calculated to deceive persons of ordinary prudence and comprehension. *Townley*, 665 F.2d at 584.

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[56] The indictment charged the defendants with all three types of schemes to defraud in connection with their management of PNRRG assets, and approximately thirteen (13) pages of the indictment are devoted to outlining the acts and activities of the defendants that allegedly comprised "the scheme." *See* Second Superseding Indictment, Record Doc. No. 190, at p. 3.

It is clear based on this jurisprudence that the law does not require the making of actual misrepresentations. Further, there is no requirement that misrepresentations, if made, must be made directly to the victims of the alleged scheme. *United States v. Pepper*, 51 F.3d 469, 472 (5th Cir. 1995). Finally, defendants inaccurately interpret Fifth Circuit pattern jury instructions 2.54 and 2.55 as requiring the government to prove the exact scheme alleged in the indictment. To the contrary, the pattern charges merely require the government to prove a scheme to defraud "that was substantially the same as the one alleged in the indictment." *See* Fifth Circuit Criminal Pattern Jury Instructions 2.54 (mail fraud) and 2.55 (wire fraud) (1990) (emphasis added). Indeed, the pattern instructions further provide that

> [i]t is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the material mailed/transmitted by wire was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of the mail/interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

Id.

D. Sufficiency of the Evidence of Scheme to Defraud

Although the defendants' motion is based on an inaccurate conception of the law, the government goes on to

detail various evidentiary scenarios from which a reasonable jury, drawing inferences and credibility determinations in favor of the verdict, could have found a scheme to defraud. The government argues generally that based on the evidence presented, a reasonable jury could have found beyond a reasonable doubt that the reinsurance agreement was fraudulent from its inception and served primarily as a means of personally enriching the defendants.

The government points to evidence indicating that the defendants' conduct was fraudulent in that they omitted to mention to the PNRRG Board, the DOI and others the millions they would realize in connection with their management of the interim reinsurance plan. The evidence showed that of the $10,741,728 in cash that was transferred to the O'Keefe trust as the sum necessary to fund the reinsurance plan, ultimately the defendants received "as profits" $5,644,879 in addition to the $1,908,487 in fees paid to AIC.[57] This came through the AIC/BCI management agreement that was signed the same day as the reinsurance agreement and two subsequent addendums, the last dated March 17, 1992.[58] In contrast, very little of the PNRRG funds went to the reinsurers or to pay claims; specifically, the total allotted to the insurance companies was $375,000 to Sphere Drake and $41,000 to BCI.[59] Defendants Schmidt, Bennett and O'Brien paid income taxes on the $5,644,879 and treated

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[57] Stipulation No. 6, trial transcript at Vol. 9, p. 9.

[58] Government Exhibits 25, 25a and 25b.

[59] *Id.*

the funds as their personal property,[60] in spite of the fact that at no time was a resolution presented to the PNRRG Board regarding the payment of profits to the defendants or was any disclosure made to the Board or other interested parties of the potential for such profits.[61] Indeed, the defendants at one point denied that they would benefit financially from their efforts for the physicians.[62] Finally, the profits came into the defendants' possession only after passing through the Bahamas.[63]

The defendants respond to the government's omission argument in several ways. First, the defendants maintain that the government overlooks evidence that BCI entered an agreement to retrocede 100% of its liabilities to Towers Reinsurance Company, and under the agreement Towers received $6,851,533 in premiums. The government points out, however, that the primary exhibit relied on by defendants in connection with this argument does not even mention Towers by name,[64] and the line of questioning cited by the defendants in support of this argument was successfully objected to by the defendants

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[60] Testimony of A.J. Alessi on direct examination by the government, trial transcript at Vol. 9, p. 60; testimony of John O'Brien on cross-examination by the government, trial transcript at Vol. 11, p. 110; Government Exhibit 51 and Stipulation No. 8.

[61] Testimony of Dr. Myron Persoff on direct examination by the government, trial transcript at Vol. 6, p. 56; testimony of Dr. Parnell Avery on direct examination by the government, trial transcript at Vol. 7, p. 90.

[62] Government Exhibit 28a at p. 32.

[63] Government Exhibit 51 and Stipulation 8.

[64] Government Exhibit 149.

at trial.[65] The jury need not have accepted a theory that relies on evidence not presented.

The defendants further attack the government's omission theory by asserting that the defendants could not have advised anyone of the profit because a profit was not anticipated. According to the defendants, government witness Michael Scruggs estimated that there would be $2.50 to almost $3.00 loss for every $1.00 of unearned premium that was transferred over under the reinsurance plan.[66] The defendants take Michael Scruggs' testimony out of context inasmuch as he explained that these figures were based upon the reinsurance plan being operated differently than it ultimately was.[67] Moreover, independent evidence allowed an inference that the defendants indeed made assurances that such a loss would not occur.[68] Finally, the jury could consider the terms of the agreement between AIC and BCI as to who would receive profits as evidence that such profits were in fact anticipated.[69]

The defendants also attack the government's omission theory by arguing that the evidence showed that any assurances defendants made that they would not receive a profit clearly referred only to the non-profit nature of

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[65] Testimony of Charles Donaldson on direct examination by the government, trial transcript at Vol. 7, pp. 33-34.

[66] Testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, p. 96.

[67] Testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, pp. 99-101.

[68] Government Exhibit 30.

[69] Government Exhibit 25.

the new risk retention group to be formed, not to the interim reinsurance agreement. They cite the testimony of insurance agent Jim Herridge, who attended the October 23, 1991 agents' meeting in Dallas. He testified that when the defendants assured the agents that there was no intent to make any profit for the defendants or the PNRRG Board, he understood them to refer to profit deriving from the new risk retention group.[70] The jury, however, was free to consider the representation itself and determine whether it was misleading on the issue. Although Herridge might have understood the representation to mean one thing, viewing the evidence in the light most favorable to the government there was sufficient evidence from which a reasonable jury could have inferred a different meaning.

The defendants also attack the government's characterization of the journey of the money through the Bahamas as a "concealed" diversion or transaction. According to the defendants, it was clear from the face of the AIC/BCI management agreement that this transfer of funds would occur.[71] Although the transaction may not have been "hidden" in the literal sense, the testimony of A.J. Alessi, the controller for AA/AIC, was that there was no explanation as to why the funds had to go through the Bahamas.[72] Defendant O'Brien explained that the funds had to flow through the Bahamas because that was what

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[70] Testimony of Jim Herridge on cross examination by counsel for Eric Schmidt, trial transcript at Vol. 8, p. 44.

[71] Government Exhibits 25, 25a and 25b.

[72] Testimony of A. J. Alessi on direct examination by the government, trial transcript at Vol. 9, p. 62.

the contract required; the contract to which he referred, however, was confected by the defendants. Viewing the evidence in the light most favorable to the government, a reasonable jury could have rejected O'Brien's testimony in view of other evidence that showed that there was no legitimate explanation for the diversion and that it was the defendants who drafted the contract requiring the transfers.

Also cited by the government is evidence that the defendants misrepresented that certain claims would be the reinsurers' sole responsibility, then proceeded to cancel physicians and reject claims that should have been their responsibility. Michael Scruggs testified that it was the common understanding when the reinsurance agreement was negotiated that only those claim files that had been opened as of the date of the agreement would remain the responsibility of PNRRG in liquidation; all other claims would be the responsibility of the reinsurers.[73] The sum to be transferred to the reinsurers was based on the claims which the DOI and Heritage Management understood to be taken on by the reinsurers and the amount necessary to protect the physicians going forward.[74]

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[73] Testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, pp. 97-98. This was also Johnny Moore's testimony. Testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, pp. 161-163.

[74] Testimony of Michael Scruggs on direct examination by the government, trial transcript at Vol. 8, pp. 96-98.

According to Scruggs, the defendants subsequently refused to pay certain claims which they should have based on the common agreement.[75] When O'Keefe was asked to rectify the situation, he refused.[76] Further, the evidence showed early cancellation of a large number of the physicians,[77] contrary to what Scruggs and Moore testified was the purpose for entering the agreement.[78] When the physicians were cancelled early (including those who were purportedly going to join the new risk retention group being formed by the defendants), they received only their personal contributions to the premium; the remainder stayed in the trust and ultimately went to the defendants as profit.[79] Scruggs testified that there was no reason to pay the defendants $8 million to cancel physicians when the DOI could have done it just as easily without relinquishing the money.[80] Further, the reason no action was taken by the DOI upon discovering that the defendants were cancelling physicians was because Johnny Moore, the individual responsible for

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[75] Testimony of Michael Scruggs on direct examination, trial transcript at Vol. 8, pp. 99-100. This was also Johnny Moore's testimony. Testimony of Johnny Moore, trial transcript at Vol. 2, pp. 195-196.

[76] Testimony of Michael Scruggs, trial transcript at Vol. 8, p. 100.

[77] Stipulation 5; Government exhibits 8 and 8a.

[78] Trial transcript at Vol. 2, pp. 184-186; Vol. 8, pp. 99-100.

[79] Stipulations 6 and 8.

[80] Testimony of Michael Scruggs on redirect examination by the government, trial transcript at Vol. 8, p. 110.

taking such action,[81] did not do so because Michael O'Keefe had (1) promised to use his political influence to help Moore retain his position and (2) told Moore he could use $527,105 placed in trust with Moore as part of the reinsurance agreement.[82]

The defendants contend that the jury could not have relied on Scruggs' testimony concerning what claims would be the responsibility of the reinsurers because Scruggs, on cross examination, retracted his testimony on the issue and admitted that there was a valid dispute over what claims the reinsurers were supposed to cover.[83] It is clear, from reviewing the testimony of Scruggs cited by the defendants, that Scruggs did not expressly or implicitly retract his testimony concerning BCI's refusal to pay claims. He simply testified that O'Keefe had changed his position on what claims were the responsibility of the reinsurers and that the contract had an arbitration clause for deciding disputes. Drawing all inferences and credibility choices favoring the government, a reasonable jury could have found a scheme to defraud.

The government also cites as evidence of a scheme to defraud the misleading nature of the communications concerning Sphere Drake as the primary reinsurer. The evidence showed that in promoting the reinsurance agreement to PNRRG and the physicians' insurance

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[81] Testimony of Michael Scruggs on redirect examination by the government, trial transcript at Vol. 8, p. 113.

[82] Testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, pp. 201-207.

[83] The defendants cite trial transcript at Vol. 8, pp. 106-107.

agents, the defendants repeatedly emphasized the presence of Sphere Drake as an economically sound insurer and one that would be acceptable to hospitals at which the covered physicians practiced.[84] The Sphere Drake contract, however, was commuted in January 1992.[85] The government maintains that from the timing of the commutation – following the apparent success of AIC'S refusal to accept certain claims for payment – a reasonable jury could infer that the Sphere Drake contract was kept in place only long enough to determine whether the defendants would be successful in refusing those claims. Furthermore, the jury could find that the reason for the commutation was to benefit the defendants, who received as "profit" any savings realized thereby.

The defendants point out that the commutation clause was part of the reinsurance agreement itself. However, other evidence indicated that the clause was not discussed when the agreement was being promoted,[86] the DOI was not informed of the commutation,[87] and there was no mention of the commutation of the primary reinsurer in Schmidt's letters to covered physicians.[88] Based on this evidence, a reasonable jury could have found that the defendants created a false impression that Sphere

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[84] Government Exhibits 26a, p. 17; 27a, pp. 1001-111; 28a, p. 30.

[85] *See* Government Exhibit 25A (January 21, 1992).

[86] Testimony of John O'Brien on cross-examination by the government, trial transcript at Vol. 11, p. 138.

[87] Testimony of Johnny Moore on direct examination by the government, trial transcript at Vol. 2, p. 225.

[88] Government Exhibits 5, 6 and 7.

Drake was covering the risks when, in fact, the contract was cancelled and the defendants received substantial profits realized by the cancellation.

In conclusion, I reject the defendants' legal argument that the mail and wire fraud statutes require the making of actual misrepresentations, to the victims listed in the indictment, and/or proof of the exact scheme alleged in the indictment. Moreover, I find that there was sufficient evidence, when viewed in the light most favorable to the government and making all credibility choices in favor of the government, to support a finding by a reasonable jury that defendants O'Keefe, Schmidt, O'Brien and Bennett in fact entered into a scheme or artifice to defraud that was substantially the same as the one described in the indictment.

IV. Paul Schmitz' Motion for Judgment of Acquittal

A. The Motion

Paul Schmitz, Director of Claims for Associated Insurance Consultants, Inc., was acquitted of the conspiracy charge and all substantive counts except Count Twelve of the indictment.[89] Count Twelve charged Schmitz with mail fraud in connection with a letter he wrote to an attorney named Mark Wham. Schmitz now moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. The government opposes the motion.

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[89] Schmitz was not charged with money laundering. The other defendants were charged with, but acquitted of, Count Twelve.

B. Inconsistent Verdict

Paul Schmitz attacks his conviction in part based upon his acquittal on the conspiracy and other substantive counts, contending that the jury, by acquitting him of the conspiracy charge, implicitly found that he was not involved in a scheme to defraud. He also argues that his acquittal of the scheme set forth in the conspiracy charge and his conviction of the same scheme in Count Twelve constitutes a "fatal variance." Finally, he argues that the jury's note asking whether "a defendant can be found guilty of count 12 without knowingly furthering the scheme set forth in the indictment" indicates the jury's confusion on this issue. All of these arguments are variations on the same theme: that the jury's inconsistent verdict requires a reversal of Schmitz's conviction on Count Twelve.[90]

The Fifth Circuit Court of Appeals has rejected the very argument Schmitz seeks to advance here. In *United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995), the defendant was convicted on two counts of mail fraud but acquitted on a charge of conspiracy to commit mail fraud in connection with a money order scam. The defendant argued in a post-verdict motion for judgment of acquittal and on appeal that, since she was acquitted of the conspiracy count, she could not be found guilty on the mail

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[90] As another variation of the theme, Schmitz argues that the doctrine of "collateral estoppel" bars his conviction on Count Twelve. This doctrine, however, only applies where successive prosecutions are involved. *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961).

fraud counts because she "cannot be found to have participated in a scheme to defraud." *Scurlock*, 52 F.3d at 537. The *Scurlock* court in rejecting this argument stated:

> A jury can render inconsistent verdicts, even where the inconsistency is the result of mistake or compromise. And, contrary to the conclusions of the defendant, an acquittal on the conspiracy charge does not necessarily equate with a finding that the defendant was innocent. The jury's verdict may have been motivated by other considerations.

Id.

Scurlock is not the only decision in this circuit to hold that inconsistent verdicts are acceptable. In *United States v. Swaim*, 757 F.2d 1530 (5th Cir.), *cert. denied*, 474 U.S. 825, 88 L. Ed. 2d 66, 106 S. Ct. 81 (1985), the court upheld a conviction on a substantive count where the jury had acquitted the defendant on a related conspiracy charge. The *Swaim* court, while noting that the verdict may have been logically inconsistent, recognized that "juries in criminal cases are free to render verdicts on the conspiracy and the underlying felony counts that are inconsistent or even the result of mistake or compromise." *Swaim*, 757 F.2d at 1536. Thus, Schmitz's post-verdict argument for acquittal is barred by this circuit's precedent.

C. Sufficiency of the Evidence

Schmitz further attacks his conviction on grounds that the evidence was insufficient to support the jury's verdict. Under Rule 29, a trial judge has the duty to grant the motion for judgment of acquittal when the evidence,

viewed in the light most favorable to the government, is so scant that the jury could only speculate as to the defendant's guilt. *United States v. Herberman*, 583 F.2d 222, 231 (5th Cir. 1978). It is not my role to weigh the evidence or determine the credibility of the witnesses, but rather to decide whether a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt. *United States v. Castro*, 15 F.3d 417, 419 (5th Cir.), *cert. denied* sub. nom. 115 S. Ct. 127 (1994). While it is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied* 504 U.S. 978 (1992), on the other hand, if "the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed." *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994).

Schmitz argues that there was insufficient evidence for his conviction because at the close of the prosecution's case there was insufficient evidence to allow the hearsay statements of the alleged co-conspirators to be considered against him. However, it is irrelevant that the jury was not allowed to consider the alleged co-conspirator statements against Schmitz, inasmuch as the jury did not have to find Schmitz a member of the conspiracy in order to convict him of the separate count of mail fraud charged in Count 12. What the government was required to prove in connection with Count 12 was (1) that the defendant willfully and knowingly devised a scheme or artifice to defraud (2) that the defendant acted with a specific intent

to commit fraud, and, (3) that the defendant mailed something for purposes of executing the scheme or artifice. *United States v. Gordon*, 780 F.2d 1165, 1170 (5th Cir. 1986).

Only one witness testified at trial regarding Paul Schmitz' conduct: Mark Wham. Wham testified that he is a Texas attorney who practices in the area of personal injury law, and that he represented Colby Fontenot and his parents in a medical malpractice suit against Dr. Charles Zeller, a physician formerly insured by PNRRG.[91] In late 1991, Wham received information from Paul Schmitz, the claims administrator for AIC, that Zeller's policy limits were $1,000,000 primary, $3,000,000 aggregate, but that the carrier was insolvent or going into insolvency and the risk would be taken by a Bahamian corporation, Builders and Contractors.[92] Throughout the remainder of 1991, and throughout 1992 and 1993, Wham continued to communicate with Schmitz. Schmitz repeatedly emphasized that they were dealing with a company out of the Bahamas, that there was limited money available to pay the claim and that if Wham delayed in settling the claim, there could be no money available to pay it.[93]

When Wham asked Schmitz to present this information in written form, Schmitz sent Wham a letter dated September 21, 1992.[94] In that letter, Schmitz repeated the

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[91] Testimony of Mark Wham on direct examination by the government, trial transcript Vol. 9, pp. 11-12.

[92] Trial transcript at Vol. 9, pp. 13-14.

[93] Trial transcript at Vol. 9, pp. 15-16.

[94] Government Exhibit 12.

reference to BCI as a Bahamian corporation and the need to settle quickly inasmuch as funds may not be available in the future. Wham testified that as a result of his communications with Schmitz, he became very concerned about being able to collect the full value of what he considered a clear cut case of liability.[95] Wham's initial demand was for approximately $950,000. Ultimately, a structured settlement was entered, pursuant to which Fontenot recovered less than $150,000. Dr. Zeller paid $50,000 of his own money to settle the claim, and Wham collected no attorney's fees from that sum.[96]

Other evidence offered by the government included the letter itself[97] and excerpts from Paul Schmitz' grand jury testimony.[98] Schmitz testified before the grand jury that he had read the reinsurance agreement and knew that there was money in the United States set aside to pay these claims.[99] Independent evidence showed that at the time of the communications between Schmitz and Wham, millions of dollars sat in the trust fund in the United States.[100] Schmitz further testified that in connection with settlement discussions people frequently inquired about the identity of the carrier, and that he would respond that BCI was the carrier. He testified that he did not think,

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[95] Testimony of Mark Wham on cross-examination by counsel for Paul Schmitz, trial transcript at Vol. 9, p. 39.

[96] Testimony of Mark Wham on redirect by the government, trial transcript at Vol. 9, pp. 40-41.

[97] Government Exhibit 12.

[98] Government Exhibit 12a.

[99] Government Exhibit 12a at pp. 19-21.

[100] Stipulation 8; Government Exhibit 51.

however, that he had ever advised anyone that the claims would never be paid.[101] Finally, Schmitz testified that he did not and was not going to contact anyone at BCI and representations to this effect contained in the letter to Wham and others were not true.[102]

The government maintains that, based upon the letter and Schmitz' grand jury testimony, and drawing all inferences in favor of the government, a reasonable jury could have found a scheme to defraud because Schmitz misled Mark Wham by telling him that BCI was a Bahamian Corporation which did not have the assets to pay his client's claim while, all along, Schmitz knew there was money available in the United States for this very purpose. The government argues that the omission of this information was a tactic used to avoid paying the full amount of a claim for which liability was clear, in order to keep money in the trust and thereby enrich the defendants. Further, the letter sent to Wham falsely stated that Schmitz acted at the direction of Builders and Contractors in offering a settlement for nuisance value when, in fact, Schmitz and the other defendants had total control over the payment of claims, Schmitz at no time contacted BCI, and Schmitz knew that there were funds in the United States from which the claim could be paid.

Schmitz maintains, in opposition, that the evidence was insufficient to support conviction because the representations made in the letter were true, i.e. Builders and Contractors was, in fact, a Bahamian company and could

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[101] Government Exhibit 12a, at p. 30.

[102] Government Exhibit 12a at p.p. 38-40.

be considered AIC's principal. This argument is based on the misconception of the law. The law is settled that "the scheme need not be fraudulent on its face, it need only involve fraudulent representations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Finney*, 714 F.2d 420, 423 (5th Cir. 1983).

Schmitz further argues that there was no proof that attorney Mark Wham or his client, a victim of medical malpractice, suffered any harm as a result of any alleged misrepresentation. I reject this argument, as well, inasmuch as the law is settled that the government need not prove that the intended victim of the mail fraud in fact suffered a loss. *United States v. Goss*, 650 F.2d 1336, 1343 (5th Cir. 1981).

Finally, Schmitz argues that any statements made in Schmitz' letter concerning the valuation of the Fontenot claim are properly viewed as the usual "puffing" or "posturing" inherent in the claims settlement process, which even Mark Wham admitted was an expected part of settlement negotiations.[103] Although Schmitz does not clearly articulate the significance of this, as I appreciate it the argument is that a legitimate reason exists for the statements made by Paul Schmitz and/or that the evidence supports an inference that Schmitz did not possess the *mens rea* required by the mail fraud statute. In response, the government points out that the jury could choose to disbelieve this explanation for various reasons.

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[103] Testimony of Mark Wham on cross-examination by counsel for Eric Schmidt, trial transcript at Vol. 9, p. 29.

For example, contrary to Wham's testimony and the very letter authored by Schmitz, Schmitz testified before the grand jury that he did not believe that he ever told anyone that claims would never be paid. According to the government, the jury could choose to view this conflicting testimony as evidence of a guilty conscience.

Having thoroughly considered the evidence and the parties' arguments, I cannot say that the evidence is so scant that I am compelled to grant Paul Schmitz an acquittal. Neither does the evidence provide equal circumstantial support to a theory of innocence and guilt. Rather, I am persuaded that a reasonable jury, drawing all inferences and making all credibility choices in favor of the government, could have found that Paul Schmitz knowingly and willfully entered into a scheme to defraud by virtue of his omissions of material facts and representations concerning the reinsurer and the availability of funds to pay the relevant claim, and that he placed matter in the United States mail in furtherance of that scheme. Accordingly, Schmitz' motion for judgment of acquittal must be denied.

V. The Defendants' Motion for New Trial

A. The Motion

The defendants seek a new trial based on the government's untimely disclosure of *Brady* material, the perjured testimony of Charles Donaldson, and other miscellaneous grounds. In connection with the motion for new trial, the defendants seek an evidentiary hearing to obtain additional testimony from government witnesses,

testimony of government agents, and to review government notes, reports, and the grand jury testimony of certain individuals not called as witnesses at trial. The government opposes the motion(s).

B. *Brady* Violations

The defendants allege "systemic violations" of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 1196-1197, 10 L. Ed. 2d 215 (1963) by the government in failing to disclose timely all exculpatory material on witnesses Charles Donaldson and Johnny Moore. The government, in opposition, maintains that the evidence was not suppressed and, moreover, was not material to the jury's finding of guilt or innocence.

The criminal defendant has a constitutional right to be protected against the prosecutor's suppression of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 1196-1197, 10 L. Ed. 2d 215 (1963). The *Brady* rule requires the prosecution to disclose material exculpatory evidence prior to trial, whether or not the defense specifically requested the evidence. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as impeachment evidence which might well alter the jury's judgment of the credibility of a crucial prosecution witness. *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 3380-3381, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972).

Recognizing that motions for new trial on the basis of newly discovered evidence "are disfavored by the courts and therefore viewed with great caution," *United States v. Fowler*, 735 F.2d 823, 830 (5th Cir. 1984), the Fifth Circuit applies a stringent substantive test which must be satisfied before the granting of a motion for new trial is appropriate. *United States v. Time*, 21 F.3d 635, 642 (5th Cir. 1994) (citing *United States v. Ugalde*, 861 F.2d 802, 808 (5th Cir. 1988)). Under the test, a defendant who challenges the fairness of his trial based on nondisclosure of favorable evidence must establish that (1) the evidence was discovered following trial; (2) the failure to learn of the evidence was due to no lack of due diligence on the part of the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material and (5) the evidence is such that a new trial probably will produce an acquittal. *United States v. Time*, 21 F.3d at 642.

When the issue is one of delayed disclosure rather than of non-disclosure, no denial of due process occurs if *Brady* material is disclosed in time for its effective use at trial. Further, the delayed disclosure must do more than impede the defendant's ability to prepare for trial; it must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant. *United States v. Campagnuolo*, 592 F.2d 852, 861-62 (5th Cir. 1979). If the defendant received the *Brady* material at trial, and in time to put it to effective use, his conviction should not be reversed "simply because it was not disclosed as early as it might have and, indeed, should have been." *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985).

Further, if the defendant knew or by reasonable diligence should have known of the existence of the evidence, it cannot be said to have been suppressed. 3 C. Wright, *Federal Practice and Procedure, Crim.* § 557.2 (West 1982 & Supp. 1996). The *Brady* rule does not require the prosecution "to conduct a defendant's investigation or to assist in the presentation of the defense's case." *United States v. Aubin*, 87 F.2d 141, 1996 WL 344046, *6 (5th Cir. 1996) (citations omitted). The rule exists to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which truth is uncovered.' " *Id.* (citations omitted).

Assuming a finding of suppression of exculpatory evidence, such evidence must be material to warrant the grant of a new trial. Evidence is material only if it is reasonably likely that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, ___ U.S. ___, 115 S. Ct. 1555, 1567, 131 L. Ed. [sic] 490 (1995); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 3384, 87 L. Ed. 2d 481 (1985). In determining whether suppressed exculpatory evidence is material, the cumulative effect of all suppressed evidence is considered.

1. Delayed Production of FBI Reports

The defendants complain that "numerous inconsistent statements of the Government witnesses [Moore and Donaldson] were not provided until the defense's insistence upon an *in camera* review by the Court and the

Court's later disclosure during the trial of these statements."[104] The defendants refer to the government's production of FBI 302 reports of interviews of witnesses during trial. Prior to trial, the defendants filed motions requesting "prior statements of [Moore and Donaldson] which are inconsistent on a material or substantial matter with his/her expected trial testimony," and [a]ny statements of another person which is [sic] contradictory or inconsistent with the expected testimony of [Moore and Donaldson] on a material or substantive matter (regardless of whether the prosecution intends to call the witness)." The record reflects that in response to these requests the government agreed to produce any such evidence as Jencks material, i.e., to produce it prior to the time the witness took the stand. According to the defendants, the government produced some Jencks Act material on the Thursday and Friday prior to trial, but numerous FBI 302 reports, including those pertaining to informant witnesses Moore and Donaldson, were not produced until during trial.

The government turned over FBI 302 reports relating to Johnny Moore for *in camera* review by the court only after the defendants had begun their cross-examination of Moore and had called once again for production of the reports.[105] Following *in camera* review, it became obvious to me that the reports had impeachment value, and I turned them over to defense counsel. I recessed trial for the day to afford defense counsel sufficient opportunity

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[104] Memorandum in Support of Motion for New Trial, at p. 21.

[105] Trial transcript at Vol. 4, p. 57.

to review the reports before proceeding with their cross-examination of Moore and portions of several of the 302 reports thereafter were utilized on cross-examination.[106]

FBI 302 reports related to the testimony of Charles Donaldson were produced immediately before the government's direct examination of Donaldson.[107] A long lunch recess was taken that day to allow for *in camera* review of the reports.[108] I considered the reports to have impeachment value and turned them over to defense counsel prior to the beginning of the government's direct examination of Donaldson. The government's direct examination took up the entire rest of that day and part of the next.[109] Thus, defense counsel were able to review the reports during direct examination of Donaldson, trial recesses and overnight. Defense counsel subsequently used portions of the reports in their cross-examination of Donaldson.[110]

The government maintains that as to all witnesses except Moore, the FBI 302 reports were provided to the defense prior to the time set forth for production by the Jencks Act and Federal Rule of Criminal Procedure 26.2, which is after the witness has testified on direct examination.[111] The government thus urges the court to find

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[106] Trial transcript at Vol. 5, p. 23.

[107] Trial transcript at Vol. 6, p. 58.

[108] Trial transcript at Vol. 6, p. 60.

[109] Trial transcript at Vols. 6 and 7.

[110] Record Doc. No. 249.

[111] *See, e.g.*, trial transcript Vol. 4, at pp. 60, 79.

compliance with *Brady* based on timely disclosures under the Jencks Act.

Unlike the discovery rules and the Jencks Act, the *Brady* rule "is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied*, 440 U.S. 947, 99 S. Ct. 1426, 59 L. Ed. 2d 636 (1979). Whether or not the production complied with the Jencks Act, the inquiry for purposes of this motion is whether it complied with *Brady*. The Fifth Circuit has recognized the distinction, emphasizing that while the Jencks Act governs the production of documents, it does not alter the rights or protections established in *Brady*, which governs the defendant's right to evidence that is material and favorable to an accused, including evidence that would materially impeach a prosecution witness. *United States v. Martinez*, F.3d, 1996 WL 362959, *7 (5th Cir. 1996). A case decided by the Third Circuit describes at greater length the importance of distinguishing the *Brady* rule from the Jencks Act:

> Under *Brady*, the defendant is apprised of the existence of exculpatory material; should the matter pertain to a possible government witness and should the government elect not to call that witness, the defendant has options of how to proceed on the basis of the exculpatory information received. The same is not true under the operation of the Jencks Act: should the government elect not to produce the witness at trial whose statements are in its hands and whose testimony could conceivably assist the defendant, the defendant may never know that statements – exculpatory or otherwise – exist. [Only]

> where a court has ruled that impeachment material falls more under *Brady*, instead of or in addition to, the Jencks Act, and orders it disclosed, the defendant has received a guarantee of protection.

United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984).

No denial of due process occurs if *Brady* material is disclosed in time for its effective use at trial. The delayed disclosure must do more than impede the defendant's ability to prepare for trial; it must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant. *United States v. Campagnuolo*, 592 F.2d 852, 861-62 (5th Cir. 1979). The defendants accurately observe that at sidebar conferences I expressed my extreme disapproval of the government's piecemeal and late production of the 302 reports, which caused considerable disruption at trial.[112] Although I afforded defense counsel time to review the reports produced during trial, and defense counsel conducted searching cross-examination of witnesses Moore and Donaldson, I cannot conclusively find that the production of the reports during trial did not adversely affect the court's ability to reach a just conclusion, particularly in light of the government's conduct in connection with the FBI 302 reports of Charles Donaldson.[113]

The government's reliance on the Jencks Act to forestall and/or withhold production of FBI 302 reports that might qualify as *Brady* material is a practice that must end. As a threshhold matter, it is not clear that the reports

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[112] *See, e.g.*, trial transcript at Vol. 7, pp. 138-139.

[113] *See* discussion at Section C, *infra*.

at issue here are properly viewed as Jencks Act material. Under the Jencks Act, 18 U.S.C. § 3500 *et seq*, the government in any criminal action prosecuted by the United States is required, on the motion of the defendant after a particular witness has testified for the government on direct examination, to produce any statement of the witness in the government's possession which relates to the subject matter as to which the witness has testified. 18 U.S.C. § 3500(b). *See also* Fed. R. Crim. P. 26.2 (West 1996). A "statement" for purposes of the Jencks Act, is defined, *inter alia*, as a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of the oral statement. *Id.* § 3500(e)(2). Whether a 302 contains sufficiently extensive verbatim recitation to bring it within the Jencks Act is a matter of fact to be decided by the trial court. *United States v. Judon*, 581 F.2d 553, 554 (5th Cir. 1978), and is most appropriately determined *in advance* of trial.

The government did not brief the court on the issue of whether or not the statements were in fact Jencks Act material, and even during trial I never made a specific determination that the 302s were Jencks Act material. Indeed, during sidebar conferences I questioned the apparent lapse of time between the taking of some of the statements and the dictation and transcription of the report(s). Interestingly, in advance of trial the government invoked the Jencks Act, but in sidebar conferences during trial they argued against disclosure of the reports

on grounds that (at[*] least some of) the statements were merely agents' summaries.[114]

Second, even if the reports contained statements that could be classified as Jencks Act material, that does not mean that they would be exempt from disclosure as *Brady* material. Unlike the Jencks Act, *Brady* material is not limited to statements of witnesses but is defined as exculpatory material, and the precise time within which the government must produce *Brady* material is not limited by specific statutory language. *United States v. Martinez*, ___ F.3d ___, 1996 WL 362959, *7 (5th Cir. 1996). The distinction already has been discussed.

Finally, the drafters of the discovery rule cited by the government concerning the timing for production of Jencks Act material recognized that "the rule is not intended to discourage the practice of voluntary disclosure at an earlier time so as to avoid delays at trial." *See* Fed. R. Crim. P. 26.2, 1979 advisory committee notes (West 1996). The government explained in sidebar conferences at trial that its concern in having to produce FBI 302 reports to criminal defendants is that the FBI agents often take statements out of context or are inaccurate in their summary and defense counsel may nitpick an agent's report to death.[115] It is difficult to see how the government on the one hand can invoke the Jencks Act as covering these reports and then argue that they are mere summaries and not verbatim recitals of witnesses' statements. In any event, the government did not have to wait

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[114] Trial transcript at Vol. 4, p. 58, 62.

[115] Trial transcript at Vol. 4, pp. 58, 62.

until trial to raise such concerns or demonstrate how its witnesses would be compromised by pretrial production of the reports.

The defendants' point to other instances in this district where the government has been reprimanded on the record for withholding FBI 302 reports.[116] What happened in other proceedings is not relevant here.

2. Inconsistencies Suggesting Suppression of Other Evidence

As another basis for a new trial, the defendants point to what they refer to as two "situations of inconsistencies" between prior statements and/or the testimony of Moore and Donaldson that allegedly suggest that other 302 reports and/or *Brady* material exist that were not disclosed before or during trial.[117] The first alleged inconsistency involves Moore's testimony concerning a post-it note attached to a September 30, 1994 letter from Donaldson seeking return of the $527,000 held in escrow. Following the production of 302 reports on the statements of Moore, the defense, on cross-examination, inquired about the existence of the post-it note. The questioning was prompted by the apparent absence of any such note from the government's exhibit of the September 30, 1994 letter. The defendants interpreted the reference in the 302 report to be to a handwritten note, but it ultimately was

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[116] Defendants' Motion for New Trial, Record Doc. No. 294, at p. 23, fn. 9.

[117] Memorandum in Support of Motion for New Trial, at p. 21.

explained that the item was a form stickum, not a handwritten note, and that the item was produced by the government prior to trial and appeared on the government's exhibit in photocopy form.[118] The actual stickum was never produced during trial.

Moore's testimony on cross-examination was consistent with the contents of the 302 report – that because the post-it note said "with the compliments of BCI," this reinforced Moore's impression that the money was for his own use.[119] The defendants complain, however, that it is possible that the prosecution was aware that Donaldson, in attaching the post-it note, did not intend for Moore to interpret the note as he did According to the defendants, if the government knew Donaldson's testimony would be as such, it should have questioned Donaldson on the matter at trial and, by failing to do so, suppressed exculpatory evidence.

As a *Brady* claim, this argument must fail. Donaldson was available for questioning by the defendants on this issue but the defendants did not raise the issue of the post-it note in their cross-examination. Further, they abandoned their initial request, made during their cross-examination of Moore, for the original post-it note.[120] The Brady rule does not require the government "to conduct a defendant's investigation or to assist in the presentation of the defense's case." *United States v. Aubin*, 87 F.2d 141,

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[118] Trial transcript Vol. 5, pp. 99-102.

[119] Testimony of Johnny Moore on cross-examination by counsel for Michael O'Keefe, trial transcript Vol. 5, p. 45.

[120] Trial transcript Vol. 5, p. 100.

1996 WL344046, *6 (5th Cir. 1996). In any event, the materiality of the allegedly undisclosed evidence is unclear because Donaldson's purpose in attaching the note would not affect Moore's *impression*.

Another unresolved inconsistency alleged by the defendants relates to Moore's and Donaldson's allegedly conflicting testimony concerning telephone conversations between them. According to the defendants, Donaldson testified at trial that he never talked to anyone with the Louisiana Department of Insurance, while Moore's testimony was "ambiguous as to 'conversations with someone in the Bahamas.' " The government, in response, points out that contrary to the defendants' interpretation of Moore's testimony, the tape recordings played at trial showed that Moore did not know who in the Bahamas he talked to:

> Moore: . . . and that one time if I recall we got somebody on the phone and I can't remember for the life of me who it was.
>
> O'Keefe: It was ah Charles Donaldson.
>
> Moore: It was Charles Donaldson?
>
> O'Keefe: Yeah.
>
> Moore: Okay, I thought I remembered the name Charles.[121]

Moreover, according to the government, the person actually in the telephone conversation was Julian Griffiths, the potential key defense witness who the defense must be assumed to have talked to prior to

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[121] Government Exhibit 31e-2.

making their motion to continue the trial based in part on the need to call him as a witness, but whom they did not call as a witness at trial. It is true that Moore was vague on the issue at trial. But it is also clear from the tape recordings played for the jury that Moore never was certain exactly who he spoke with in the Bahamas, if anyone. I fail to see the inconsistency urged by the defendants; indeed, the defendants refer to ambiguity, which is not the equivalent of inconsistency. While the government's response certainly suggests that there might be additional information bearing on the issue that was not introduced to the jury (*e.g.*, testimony of Julian Griffiths), the information was available to the defendants prior to trial, through either Mr. Griffiths or Mr. O'Keefe, but the defendants did not avail themselves of it and do not explain why they failed to do so. This *Brady* claim lacks merit.

Finally, the defendants speculate that the government has failed to disclose information concerning Charles Donaldson's actual or apparent authority to bind BCI. According to the defendants, in pretrial motions they explored the belief that Donaldson in fact had (actual or apparent) authority to enter into the reinsurance agreement. In pretrial discovery, one of the documents found in the Price Waterhouse files purported to be a draft of the minutes of the December 1988 meeting of the BCI Board of Directors. A representative of Price Waterhouse, on questioning by defense counsel during Rule 15 depositions, testified that he had never seen the document. The government's efforts to determine its source ultimately revealed a labeling error that had led to the inclusion of the draft minutes with price Waterhouse documents, and

the government advised defense counsel that the document actually was obtained from a BCI attorney.[122] The defendants attempted to interview BCI attorney Brian Moree, who they suspected was the attorney referred to by the government, but he asserted attorney-client privilege. He admitted that he had been interviewed by government agents but refused to disclose any information as to that interview.

Prior to trial, the government offered its explanation of the draft minutes:

> We do not know when this draft was prepared. However, if the draft was a working draft prepared in 1988 prior to the filing of the one found in the public records which does not contain the five years thereafter language, it simply means that the language was rejected at that time.[123]

However, to date, the government has not produced to the defendants a report or any other document generated from the interview with Brian Moree, in spite of Moree's reference to such a report, defense counsel's contention that it contains possible exculpatory material and defense counsel's attempts to secure such evidence by independent means. The government correctly maintains that it decides the theory on which to base its prosecution. However, this does not justify withholding from the defendants potentially exculpatory information that may assist in the framing of a defense.

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[122] *See* Attachment B to Defendants' Motion for New Trial, Record Doc. No. 294, at p. 2

[123] *See* Attachment B to Defendants' Motion for New Trial, Record Doc. No. 294, at p. 2.

Despite evidence of suppression, however, I question the defendants' diligence in pursuing the issue before and during trial. The issue of the draft minutes was explored with Donaldson on cross-examination at trial. Donaldson recognized the document and testified that he had written the words "five years thereafter" on it in 1988.[124] However, although prior to trial the defendants took deposition testimony from the Registrar of Insurance for the Bahamas, an official who could testify concerning the alleged "false records case in the Bahamas," the defendants chose not to present her testimony to the petit jury. The defendants did, however, present the jury with the deposition testimony of BCI attorney Terry North, who unequivocally testified that Donaldson lacked authority. Based on these circumstances, I find the defendants' diligence in pursuing information to support this theory of authority inadequate and reject this Brady claim.

3. Disruptive Effect of Disclosures During Trial

The defendants also seek a new trial based on the alleged disruptive effect of certain disclosures during trial. First, the defendants point to inconsistent testimony with regard to the exact location, time and circumstances surrounding the various tape recordings made by Johnny Moore. According to the defendants, despite their efforts prior to trial to establish the number, timing and presence of FBI agents at the tape recordings, Moore's story kept

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[124] Testimony of Charles Donaldson on cross-examination by Bennett and O'Brien, Record Doc. No. 249, at pp. 22-24.

changing. As late as the week before trial, Moore met with defense counsel and the government to advise them of previously undisclosed information concerning the making of the tape recordings. The defendants maintain that the various revelations about the tapes immediately before and during trial simply were not timely enough.

The complete "truth" about the number of tapes and the circumstances in which Moore made them probably will never be known. Moore's story as to when and where certain recordings were made seemed to change at every turn, and the inconsistencies for purposes of impeachment became apparent to the defendants both before and during the trial. However, the primary basis on which the defendants sought to suppress the tapes, both before and during trial, was rejected then and fails now: it was apparent both before and during trial that the FBI was not present for all the tape recordings, and FBI agent Susan Phillips at no time testified otherwise.[125]

The defendants also point to the allegedly untimely revelation of tape recorded conversations between Johnny Moore and Tim Screen of the Louisiana Attorney General's office. The recordings were made by Mr. Screen during the time that Moore was cooperating with the United States government but state authorities were unaware of it and were undertaking their own investigation. The conversations between Moore and Screen were brief and their relevance, if any, was as impeachment evidence. The tapes were produced to the defendants

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[125] *See* trial transcript at vol. 4, p. 63 ("It's apparent to me that she did not represent that all of the tape recordings were made in her presence, but that some of them were.").

prior to cross-examination of Moore.[126] Trial was recessed for the day to allow defense counsel an opportunity to review the conversations between Moore and Screen.[127] The tapes were utilized on cross-examination and, at the insistence of the government, were played for the petit jury.[128] Defense counsel did not seek any additional preparation time before proceeding with cross-examination.[129] I find that contrary to the defendants' argument, their ability to use the evidence was not affected by its delayed disclosure. Neither, as I observed during trial, do I ascribe any dishonorable motives to the prosecution in connection with this delayed disclosure.[130]

C. The Perjury of Charles Donaldson

1. Standard Governing Perjury as Basis for New Trial

The defendants maintain that they are entitled to a new trial based on the government's reliance on the false

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[126] Discussions in sidebar conferences suggested that the defendants had been informed of the tapes even earlier, well before trial, the tapes had been overlooked and/or never inquired into again. *See* trial transcript at Vol. 4, p. 14.

[127] Trial transcript at Vol. 4, p. 56.

[128] The defendants admit in their motion papers that the tapes were played, "and with appropriate cross examination." Record Doc. no. 294, p. 26.

[129] *See Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) ("Because the prosecution did not suppress any evidence, [the defendant] . . . can not convert his tactical decision not to seek a recess or continuance into a *Brady* claim.")

[130] Trial transcript at Vol. 4, p. 23.

testimony of Charles Donaldson in violation of *Napue v. Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, 1178, 3 L. Ed. 2d 1217 (1959). To prevail under *Napue*, the defendants must show (1) that Donaldson's testimony was actually false; (2) that the testimony was material, i.e., that disclosure of the perjury would have been reasonably likely to have affected the judgment of the jury; and (3) that the prosecution knew Donaldson's testimony was false. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993) (*citing Napue* as source of standard; *United States v. Chagra*, 735 F.2d 870, 874 (5th Cir. 1984).

2. The Perjury

The first element of the *Napue* standard is easily satisfied here because four instances of perjury by Charles Donaldson have been revealed to date. Two of the acts of perjury were revealed during trial. First, Donaldson denied but then admitted on cross-examination[131] that in his FBI interview(s) he had falsely accused O'Keefe of participating in the alteration of a set of 1988 BCI Board meeting minutes to reflect that Donaldson had authority to bind BCI. Defense counsel's cross-examination on this issue was based on an FBI 302 report of Donaldon's March 3, 1995 FBI interview, which was not furnished to the defendants until immediately prior to the government's direct examination of Donaldson. The relevant testimony was:

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[131] Because Donaldson was to undergo surgery in March and might not be available to return to court during presentation of the defendants' case, defense counsel were afforded significant latitude in cross-examining him.

Q: Did you ever tell anyone that Mr. O'Keefe had created those minutes of December '88 by the addition of the words "five years thereafter."

A: I don't recall. I – I know I admitted I said that I created – I put them in myself.

Q: That's not my – my question. Let me rephrase it.

. . .

Since you started cooperating with the Government, when you're supposed to be truthfully (sic), have you ever told anyone that Mr. O'Keefe created the minutes of December 1988? And by create I mean adding the five years thereafter?

A: I don't think so. I may have.

Q: You may have?

A: Yes. I can't recall. Was that a clear answer? I can't recall.

Q: You're suggesting that you may have accused him of creating documents that you created?

A: I said I can't recall.

COURT: You also said you may have.

A: Yes. But I can't remember whether I did or not.

Q: Isn't it a fact, Mr. Donaldson, that you told the agent that Mr. O'Keefe suggested that the minutes be altered?

A: No response.

Q: Didn't you tell the agents that?

A: No, I did not.

Q: Your testimony under oath is that on March 3, 1995, you did not tell Agent Susan Phillips that Mr. O'Keefe suggested that the BCI shareholders minutes be altered to make it appear that Donaldson had authority to enter into the contract; did you make that statement to the FBI?

A: At – I – I did, yes.

Q: And that was a false statement, wasn't it sir?

A: It was a false statement.

Q: And you lied to the FBI, did you not?

A: Yes, I did.[132]

Donaldson committed this act of perjury on the witness stand at trial by denying an act to which he then admitted.

Cross-examination at trial further revealed that Donaldson had committed perjury at his Rule 11 proceedings in the United States District Court for the Middle District of Louisiana on March 27, 1995. At the Rule 11 proceedings, Donaldson pled guilty to one count of mail fraud pursuant to a plea agreement with the government.[133] FBI agent Susan Phillips read into the record the factual basis for the plea based on the FBI investigation,

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[132] Testimony of Charles Donaldson on cross-examination by counsel for Michael O'Keefe, Sr., Record Doc. No. 249 at pp. 105-107.

[133] Government Exhibit 43a.

including the statement that, "investigation . . . has further confirmed that Michael O'Keefe acted with Charles Donaldson to create the forged set of minutes submitted to [the Nineteenth Judicial District Court for the State of Louisiana]."[134] At trial, Donaldson admitted under cross-examination that although O'Keefe did not create the minutes, at the Rule 11 proceeding he testified under oath that this factual basis was true and accurate.[135]

On July 31, 1996, at oral argument on defendants' post-trial motions, the startling revelation was made by the government lawyers that Donaldson's perjury was not that which seemingly was revealed at trial four months earlier:

> THE COURT: All right. But, is there any question in your mind, Mr. Boitmann, that Mr. Donaldson did, in fact, commit perjury?
>
> MR. BOITMANN: I have to answer that by answering: Yes, but not the perjury that everybody has been talking about.
>
> THE COURT: Oh, there's some other perjury?[136]

Mr. Boitmann then explained that it was the government's position that Donaldson lied on the witness stand at this trial by testifying that he had ever told the FBI agent that O'Keefe had altered the BCI minutes. According to the government, Donaldson never told the agent

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[134] Defendants' Memorandum in Support of Motion for New Trial, Record Doc. No. 294, at p. 5.

[135] Record Doc. No. 249 at pp. 109-113.

[136] Transcript of oral argument, Record Doc. No. 316, at pp. 3-4.

that O'Keefe suggested that Donaldson create the false minutes. Rather, the government contends, Agent Susan Phillips erroneously reported Donaldson's statements at the interview, the error in the FBI 302 report was erroneously incorporated into the factual basis for Donaldson's plea, and Donaldson perjured himself by adopting the factual basis as the truth at the Rule 11 proceedings.[137] Accepting this explanation as true, Mr. Boitmann thus admits knowledge of two acts of perjury by Donaldson, one before the Middle District at the Rule 11 proceedings and another on the witness stand at trial during cross-examination of Donaldson.

Mr. Boitmann's admission of knowledge of these latter two acts of perjury suggests the possibility that yet another act of perjury occurred at this trial but was not brought to the attention of the court and defense counsel at that time: Donaldson's denial that the government had any knowledge of his perjury prior to trial. Donaldson testified on cross-examination that:

> Q: Well, did you ever tell the Prosecutors that you lied about Mr. O'Keefe concerning the minutes? Did you ever tell the Prosecutors that?
>
> A: I don't believe so.
>
> Q: So, they're just finding out about it for the first time right now; is that what you're telling me?
>
> A: I –

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[137] Transcript of oral argument, Record Doc. No. 316, at pp. 11-12.

Q: The question is: Are they finding out about this false allegation for the first time right now, sir?

A: Yes, I suppose so.[138]

What the written transcript does not reveal, and what was highlighted at oral argument when defense counsel played back this portion of the tape-recorded transcript, are almost interminable pauses between the questions and responses highlighted above. I conclude that in light of the information revealed by the government at oral argument, the clear significance of Donaldson's protracted pauses in answering the straightforward questions is that he was not testifying truthfully when he denied that the government had knowledge of his perjury prior to trial. The sheer number of perjuries calls into question whether some as-yet-unidentified additional acts of perjury occurred.

3. The Government's Knowledge

Another requirement of the *Napue* standard is that the prosecution knew the testimony was false. It was my distinct impression during sidebar conferences at trial that the government knew Donaldson's testimony at trial and at the Rule 11 proceedings was false. At oral argument on the defendants' motions, Robert Boitmann advised the court that the government became aware of the error in the factual basis and the FBI 302 report prior

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[138] Record Document No. 249 at pp. 113-114.

to Donaldson's arraignment and tried to correct the factual basis two days before-the arraignment, but the correction never made it into the record and the government did not learn of this until Donaldson's testimony at trial.[139] I consider this explanation incredible considering that the government also produced and delivered to defense counsel an FBI 302 report that did not contain the claimed correction and failed to question Agent Phillips at trial despite her presence in court at various times. In any event, the government learned of the perjury at trial but, as discussed hereinafter, took no measures to correct it at trial.

4. Effect of the Perjury on Fairness of Trial/ Materiality

The defendants maintain that they were deprived of a fair trial because the government failed to correct the perjurious statements of Donaldson when they surfaced. Due process is violated even when the prosecutor, though not soliciting false evidence from a government witness, allows it to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *United States v. Barham*, 595 F.2d 231, 241-242 (5th Cir. 1979). The duty to correct false testimony of a government witness is on the prosecutor, and that duty arises as soon as the false evidence surfaces. *Napue*, 79 S. Ct. at 1177.

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[139] Transcript of oral argument, excerpt of government argument, at p.4.

The two instances of perjury revealed at trial, though not "corrected" by the government, were explored before the jury and I believed at that time that the jury was able to make the credibility determination called for under the circumstances. The fairness of the trial was called into question, however, by the revelations at oral argument. Although defense counsel elicited admissions from Donaldson on cross-examination that were damaging to his credibility, it has become apparent after trial that the true nature and scope of Donaldson's perjury was never disclosed or corrected by the government, or revealed on cross-examination by the defendants.

Despite numerous opportunities both before and after trial to correct the error and/or to prevent perjurious testimony, the government did not address the matter until after trial. For example, on February 9, 1996, following a status conference in chambers at which defense counsel accused the government of misleading them by changing the indictment to delete the overt act concerning the affidavit, I urged the government to be as forthcoming as possible with the defendants prior to trial. The government thereafter sent defense counsel a letter advising, *inter alia*, that

> 1. FIVE YEARS LANGUAGE
>
> a. Donaldson added the language of "five years thereafter" to the BCI resolution. We do not believe that O'Keefe directed him to add the language. However, we do believe that O'Keefe had input into the drafting of the Kisler rebuttal affidavit signed by Donaldson which incorporates the reference to the five years thereafter. However, we note that we have deleted from the

> indictment the statement about the use of the resolution by O'Keefe in the civil proceedings.[140]

The government did not explain why they "[did] not believe that O'Keefe directed [Donaldson] to add the language ["five years thereafter" to the minutes]" – i.e. that, as they maintain now, Donaldson never accused O'Keefe of doing so but that an error was made by the agent who reported on Donaldson's statement.

Further, at trial the error referred to by the government appeared in the express language of an FBI 302 report furnished by the prosecutors to the defendants. After providing defense counsel with the erroneous report, the government watched defense counsel undertake a cross-examination that, in view of the information available to the government but unapparent to anyone else, was based on the erroneous report and thus a misunderstanding of the perjury. Despite all of this, the government at no time sought to correct the alleged error by questioning the individual they now blame for the error – Agent Susan Phillips, who was present in court at various times during trial.

The government maintains that it advised the court of the circumstances of the "new perjury" during a sidebar conference in chambers during trial:

> THE COURT: Now, let me ask you this question, Mr. Boitmann. When did you find out that he had lied?

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[140] Exhibit B to Defendants' Motion for New Trial, Record Doc. No. 294.

MR. BOITMANN: Your Honor, we were aware – in the context of when [he] lied under oath, I was not aware of – and probably should have been more aware, but I was not aware of what occurred at the plea with regard to that. As a – as respect to whether or not he claimed that Mr. O'Keefe had done the memorandum, well that particular claim –

THE COURT: What memorandum?

MR. BOITMANN: Not memorandum, excuse me, minutes.

I think the Court look at his reports of interview. I think we gave it over to the Defense. I know that in the grand jury material where we had, it was clear to me that he was saying he had prepared the minutes. He had sent both sets of minutes to Mr. O'Keefe and Mr. O'Keefe told him that the addition he made didn't make any difference. And I took that to mean that the addition he added didn't help the matter, because factually it didn't help the matter. So, in that regard –

THE COURT: Let me ask you one more time. Did you ever talk to him about that particular episode where O'Keefe had altered those minutes?

MR. BOITMANN: I think Ms. Taylor talked to him about that.[141]

MS. TAYLOR: Yes, and the only indication that I'm aware of was Susan Phillips misstating what I've always understood from Mr. Donaldson. He prepared the false five years thereafter [sic] on the minutes. He gave those falsified minutes to Mr. O'Keefe who then incorporated something he knew to be false into an affidavit. Mr. O'Keefe then took that affidavit and filed it in the court. Mr. O'Keefe did not make the false minute entry. But, he knew Donaldson had made a falsification on the minute entry and had used it. That's always been my understanding of what Mr. Donaldson said Mr. O'Keefe had done.[142]

This colloquy cannot by any stretch of the imagination be viewed as explaining the circumstances that were disclosed at oral argument four months after trial.[143] The prosecutors' answers are obviously evasive. Moreover, review of the discussion that followed this colloquy

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[141] Trial transcript at Vol. 9, pp. 150-151.

[142] Trial transcript at Vol. 9, p. 151.

[143] In any event, the colloquy occurred outside the jury's presence and was held days after Donaldson testified, had returned to his home in the Bahamas, and presumably was unavailable due to previously scheduled surgery.

reveals that far from clarifying the matter, the confusion remained: after Ms. Taylor's response, defense counsel pointed out that the factual basis adopted by Donaldson under oath at the Rule 11 proceedings stated that O'Keefe had created the false minutes. I concurred, and I also observed that Donaldson admitted that he had lied to the prosecuting attorneys. Mr. Boitmann nodded affirmatively but Ms. Taylor shook her head negatively. I pointed out my frustration at the prosecutors' inability to agree, at which time Mr. Boitmann explained that he was merely agreeing that that was Donaldson's testimony; Ms. Taylor did not explain why she was shaking her head negatively. The prosecutors made no further attempts to clarify the matter, in spite of the obvious confusion and misunderstanding and the availability of Agent Phillips to explain the alleged error.

The defendants suggest that the government's conduct went beyond a failure to correct the perjury, but was even more egregious in that the prosecutors sought to benefit from it in several ways at trial. For example, in their redirect examination of Donaldson the government sought to capitalize on the issues raised by defense counsel in cross-examination by eliciting the damaging testimony that although O'Keefe did not draft the false minutes, he knew they were false and incorporated them into an affidavit to be presented to a Louisiana state court. This is the very issue that the government deleted from the indictment and has argued is immaterial to a finding of guilt. Further, in closing argument the government sought to bolster Donaldson's credibility by suggesting that in spite of his perjury (the nature and scope of which at the time was still not understood by defense

counsel, the court, and undoubtedly the jury) no perjury occurred in the trial before my court and, in any event, the rest of Donaldson's testimony was credible and corroborated.[144] In light of the facts disclosed at oral argument four months after trial, I agree that the government's conduct on redirect examination and in closing argument was improper. Also apparent is that the prosecutors sought to preserve their own image by failing to correct Donaldson's testimony, elicited on cross-examination, that the government did not learn of his perjury until during trial. Regardless of the circumstances urged by the government, this testimony conveyed a false impression that the government was in no manner apprised of Donaldson's misconduct.

Finally, I note that although prior to oral argument I suspected but was not persuaded that the change in the indictment concerning the false affidavit was improperly motivated, the more recent revelations by the prosecuting attorneys confirm what I suspected: the change in the indictment was part of an effort to mislead defense counsel in their preparation for trial, to cover up Donaldson's conduct and thereby salvage his credibility, and to protect the credibility of the prosecution itself.[145]

The government maintains that the defendants are not entitled to a new trial because even assuming the

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[144] Trial transcript at Vol. 12, p. 20.

[145] My ruling on the defendants' motion to dismiss the indictment remains unaffected by this finding, insofar as there was no perjury before the grand jury and the indictment itself was not tainted by the government's decision to remove the overt act.

perjury was not revealed until after trial, it was not material to the jury's determination. A new trial is required when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury. *Kyles v. Whitley*, ___ U.S. ___, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490 (1995);[146] *Kopycinski v. Scott*, 64 F.3d 223, 225 (5th Cir. 1995); *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir.), *cert. denied*, 130 L. Ed. 2d 51, 115 S. Ct. 102 (1993). The showing is satisfied if the undisclosed evidence is such that it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles*, 115 S. Ct. at 1566. The Supreme Court has noted that this strict standard is especially appropriate in false testimony cases because such cases involve not only "prosecutorial misconduct" but also "a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104, 96 S. Ct. at 2397).

The government maintains that the undisclosed circumstances are not material because other evidence corroborated Donaldson's unperjured testimony and the jury could have found the defendants guilty of the charged offenses based on other record evidence.

Any argument that Donaldson's testimony was not material is undermined by the clear impression the government lawyers gave prior to trial that Donaldson was an indispensable witness. Their need for his trial testimony was the primary basis on which they opposed the

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[146] *See also United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1975); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1975).

defendants' motion to continue the March 4, 1996 trial.[147] Donaldson and Johnny Moore were among the first witnesses to testify at trial, and it took a number of days to hear their testimony. In any event, the government's focus is on the *substantive* relevance of the undisclosed evidence and its overall bearing on the defendants' guilt, but "it is immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness." *United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979). As the Supreme Court has noted, "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177. Elaborating further, the Supreme Court quoted from a lower court decision:

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Id. at 269-270, 79 S. Ct. at 1177 (citations omitted).

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[147] Record Doc. No. 203.

The defendants point to several specific ways they would have proceeded differently in attacking Donaldson's and Moore's credibility had the government disclosed the error in the FBI 302 report and the fact that Donaldson had pled guilty to an erroneous factual basis.[148] For instance, their cross-examination would have been simply to show that Donaldson was willing to testify under oath to any script he believed the government wanted him to adopt, regardless of its truth; it would not have been necessary to question him specifically about the affidavit.[149] Further, disclosure of the error in the factual basis adopted by Donaldson would have justified inquiry both before and during trial into the process by which the factual bases were drafted and what role the government witnesses played in this. Finally, defense counsel state that they would have explored at greater length the plea agreement process and the motivation Donaldson and Moore had to mold their testimony to curry favor with the government.[150]

The defendants also point to the government's lack of knowledge of the many changes in Johnny Moore's testimony as a factor that is cumulative to Donaldson's perjury. While the defendants do not articulate any specific perjury by Johnny Moore, they accurately point out that

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[148] August 2, 1996 letter from defense counsel.

[149] The significance of this is that the damaging redirect examination about the affidavit likely would not have been allowed.

[150] The government's response to the defendants' letter does not alter my impression. It relies on revisionist history that is clearly refuted by the events as they appear in the record. *See* Government letter dated August 7, 1996.

Moore continuously changed his testimony on many matters. As I observed in a sidebar conference during trial, I witnessed utter surprise on the faces of the government lawyers several times during Moore's testimony, and the government lawyers acknowledged their surprise at the changes in Moore's testimony:

THE COURT:	. . . if you watch the expressions – I have a vantage point in which I can see –
MS. TAYLOR:	I'm dying.
THE COURT:	– the expressions of the FBI agent, Dee Taylor and –
MS. TAYLOR:	I try to hide it.
THE COURT:	Bob Boitmann. I can't see Tim at all, but, you know, I see the grimaces. And I grimace for them, really.[151]

Later in the same sidebar conference, the government lawyers questioned the usefulness of the – FBI 302 reports of Moore for purposes of impeachment, suggesting that *due to the number of changes in Moore's testimony,* he had been thoroughly impeached already:

MS. TAYLOR:	– I mean, you know, how many more times do you want to show he's changed his story? I mean, you know, he can only, like, so many times.[152]

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[151] Trial transcript at Vol. 4, pp. 28-29.

[152] Trial transcript at Vol. 4, p. 50.

I commented several times that the many changes in Moore's testimony were fodder for cross-examination. However, in view of the circumstances surrounding Donaldson's testimony, I now find that the cloud cast over Moore's testimony, and the government's reaction to it, lends additional support for the grant of a new trial.

Based on the foregoing, I find that the defendants have made a sufficient showing that the undisclosed evidence concerning Charles Donaldson, when considered in conjunction with the consistently contradictory testimony of the other key government witness, Johnny Moore, reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict, and I reject the government's argument that the presence of other evidence against the defendants necessarily turned a tainted trial into a fair one. Although based on the extensive briefs filed by all the parties I was prepared to deny the defendants' motion for a new trial, following oral argument I am now persuaded that a new trial is the proper remedy under the circumstances.[153]

VI. Remaining Motions

The defendants seek an evidentiary hearing in connection with their motion for new trial in the event the

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[153] Based on this finding, I decline to address the defendants' remaining miscellaneous arguments for a new trial, including (1) the government's voluntary dismissal of five counts from the indictment following the government's case; (2) the alleged "marginal" nature of the evidence; and (3) the cumulative effect of all the grounds asserted in all other defense motions.

court denies their motion. I have decided to grant their motion and, in any event, I am able to decide the motion without an evidentiary hearing. Although the government did not request an evidentiary hearing and indeed opposed the defendants' request for one, I note that the government is not prejudiced by my grant of a new trial without holding such a hearing. I view the government's admissions before the court as the equivalent of testimony under oath, insofar as the attorneys are at all times bound by an oath of honesty and are obligated to seek justice. A hearing would add little if any information to that already at my disposal, which I consider sufficient for purposes of ruling on the defendants' motions.

The government seeks reciprocal discovery in the event that I grant the defendants' motion for evidentiary hearing and in camera review. In view of my denial of an evidentiary hearing and *in camera* review, the government's motion for reciprocal discovery is rendered moot.

Finally, the defendants' motion for judgment as a matter of law on the forfeiture issue is rendered premature in view of my decision to grant a new trial.

VII. Conclusion

The defendants have been successful in obtaining a new trial. As I said before in addressing the perjury of Charles Donaldson, prior to oral argument I was not inclined to grant this remedy. I believed that the jury, which performed its duty so diligently, had been apprised of all relevant information required to reach a verdict. At oral argument it became apparent that such was not the case.

Because of the sensitive nature of the court's inquiry concerning conduct of government counsel, the court's personal participation and questioning of counsel in connection with that inquiry, and the findings of the court resulting from that inquiry, the court feels compelled to recuse itself from further handling of this matter in accordance with 28 U.S.C. § 455.

Accordingly,

IT IS ORDERED that the defendants' motion for new trial IS GRANTED.

/s/
MOREY L. SEAR
CHIEF JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES	CRIMINAL ACTION
VERSUS	No. 95-0106
MICHAEL O'KEEFE, SR., ET AL.	SECTION "S"

MINUTE ENTRY

April 6, 1998.

The court heard oral argument on Wednesday, April 1, 1998, on defendants' Motion for an Evidentiary Hearing and In-Camera Review (Doc. #284). The court granted this motion to the extent that it requested an evidentiary hearing and instructed the parties that the court's decision on the scope of the evidentiary hearing and the materials to be submitted for in-camera inspection would be forthcoming. The court also heard oral argument on defendants' Motion for New Trial on Grounds of Newly Discovered Evidence (Doc. #370). The parties submitted this motion for decision along with the following matters:

(1) The government's request for reciprocal discovery contained in its Memorandum in Opposition to Defendants' Motion for an Evidentiary Hearing and In-Camera Review (Doc. #302);

(2) Defendants' Joint Motion for Judgment as a Matter of Law/Motion for Directed Verdict as to the Forfeiture (Doc. #282); and

(3) Defendants' Motion for New Trial (Doc. #294), which contains defendants' as yet

unaddressed arguments for new trial, including

(a) the government's voluntary dismissal of five counts from the indictment following the government's case;

(b) the alleged "marginal" nature of the evidence; and

(c) the cumulative effect of all the grounds asserted in all other defense motions.

The parties stipulated that the ruling on these matters would be deferred pending the dispositions of the defendants' petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, which is currently before the United States Supreme Court. The court agreed to consider a proposal from the government requesting further instruction from the United States Court of Appeals for the Fifth Circuit on the scope of the issues to be addressed on remand.

New Orleans, Louisiana, this 3 day of April, 1998.

/s/

MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES	CRIMINAL ACTION
VERSUS	No. 95-0106
MICHAEL O'KEEFE, SR., ET AL.	SECTION "S"

ORDER AND REASONS

June 5, 1998.

Considering the memoranda of counsel, the opinions of Chief Judge Sear and the United States Court of Appeals for the Fifth Circuit, the applicable law, and after thoroughly reviewing the transcript of the trial of this matter and the record, IT IS ORDERED that this court's previous order, issued at oral argument on April 1, 1998, granting defendants' Motion for an Evidentiary Hearing and in-camera review (Doc. #284) be and hereby is supplemented as follows.

In their original Motion for an Evidentiary hearing, which Chief Judge Sear ruled was moot in light of his granting of defendants' Motion for New Trial, defendants requested that the court hold an evidentiary hearing for purposes of obtaining testimony of Johnny Moore, Charles Donaldson, the prosecutors, Agents Susan Phillips, Martha Fitzpatrick, Clyde McCoy, and Investigator Scott Bailey. Defendants also requested disclosure of all of the "rough notes" of FBI agents who interviewed Johnny Moore and/or Charles Donaldson, "along with any notes by the prosecution of these interviews." *See* Defendants' Motion for an Evidentiary Hearing and In-

Camera Review (Doc. #284). In their supplemental memorandum, filed after the Fifth Circuit's ruling, defendants request that this court conduct an equally extensive evidentiary hearing and undertake a broad in-camera inspection of documents and transcripts. *See* Supplemental Memorandum in Support of Motion for an Evidentiary Hearing and In-Camera Review (Doc. #363). The scope and purposes of these requested inquiries are not clearly presented.

In order to receive an evidentiary hearing on a defendant's claim that the government has knowingly used perjured testimony which has undermined confidence in a jury verdict, the defendant bears the burden of specifically identifying which testimony is alleged to be perjured, the reasons the defendant believes it is perjured, and that the government knew of the perjury. As the Fifth Circuit has previously stated in the context of an application for federal habeas corpus relief, "[a]llegations of perjured testimony must be supported by substantial factual assertions capable of resolution by an evidentiary hearing." *United States v. Fishel*, 747 F.2d. 271, 273 (1984). Likewise, to receive an evidentiary hearing on a defendant's claim that his right to disclosure of *Brady* material was violated,[1] the defendant bears the burden of identifying evidence which the government suppressed and alleging that the evidence was either favorable to the

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[1] *Brady v. Maryland*, 83 S. Ct. 1194 (1963), requires the government to disclose exculpatory evidence that is material to a defendant's guilt or punishment and evidence useful to impeachment of witnesses, in such a manner that the defendant receives the due process of law guaranteed by the United States Constitution.

defense or exculpatory and the evidence was material. Thus, an evidentiary hearing is only required on a Motion for New Trial when the defendant alleges facts which, if proved, would entitle the defendant to a new trial.

A post-trial evidentiary hearing on a Motion for a New Trial is a device which a court may use to determine the truth or falsity of specific allegations which, if proved, would require a new trial. It is not, however, a general discovery device to be used as a means of searching for information from which a defendant might make these specific allegations. If it were, post-trial evidentiary hearings might occur as a matter of course following every conviction, and would surely far exceed the scope and length of the trial itself.

However, in light of the previous findings surrounding the government's prosecution of this matter, this court is especially sensitive to the dilemma which the defendants face in meeting their burden of specifically alleging the existence of a *Brady* violation without having access to all of the information the government possesses. Indeed, the requirement that the defendants bear the burden of making a specific allegation without this access places upon the government substantial trust not only in its candor and professionalism, but also in its duty to affirmatively search for *Brady* material. There is no "affirmative duty upon the government to take action to discover information which it does not possess.[2] However,

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[2] *United States v. Beaver*, 524 F.2d 963, 996 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1498 (1976); *see also United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991); *United States v. Dunn*, 851 F.2d 1099, 1101 (8th Cir. 1980); *United States v. Driver*, 798 F.2d 248, 252 (7th Cir. 1986).

as the Fifth Circuit so aptly stated in *United States v. Auten*, 632 F.2d 478 (5th Cir. [Unit A] 1980), "[i]f disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government." *Auten*, 632 F.2d at 481.

In the present case, Assistant United States Attorney Robert J. Boitmann has testified, by way of an affidavit submitted in support of the government's previously filed Motion for Reconsideration of Order Granting New Trial (Doc. #327), that he "had never read Donaldson's FBI Form-302 (hereinafter referred to as "302") report transcribed April 4, 1995 prior to trial." He also testified at that time that he "had not seen Special Agent Phillips' handwritten notes until very recently." Similarly, Assistant United States Attorney Dorothy H. Taylor testified, by way of an affidavit in support of the same motion, that she "was not aware of the existence; I did not use; nor did I have the FBI Form-302 (302) dated March 3, 1995, transcribed April 4, 1995 prior to the morning of Mr. Donaldson's testimony on March 11, 1996." Although ostensibly submitted as proof that the government did not knowingly allow perjured testimony to be introduced into trial in violation of *Napue v. Illinois*, 79 S. Ct. 1173 (1959), these statements bring into question the vigor with which the prosecutors reviewed their information for *Brady* material. Indeed, these statements are a virtual admission that the prosecution had not made the investigation required by *Brady* into the existence of *Brady* material that was within the government's possession, until the time of trial.

The prosecutors disclosed to the defendants the specific "302" report to which Boitmann and Taylor refer and the Court of Appeals held that ultimately the *Brady* material contained in that report was provided timely enough to be put to proper use. However, that holding does not foreclose the possibility that there were other undisclosed *Brady* violations. This possibility appears greater when the prosecution's candor is less than forthcoming. Although the prosecution in this case boasts that Chief Judge Sear and the Court of Appeals have exonerated the prosecution from any form of prosecutorial misconduct,[3] this court does not recognize absolution in these writings. The Fifth Circuit agreed with Chief Judge Sear that the prosecutors' explanations regarding the inconsistencies in Donaldson's testimony were "unsatisfying." Moreover, the Fifth Circuit notes that although the prosecutors' explanations were not 'duplicitous," they were "inartful." Thus, although it is true that, as the Fifth Circuit notes, Chief Judge Sear specifically refused to find that the government attorneys suborned perjury or committed misconduct, this is hardly a ringing endorsement of the prosecutions' trial tactics in this case. The oral argument of the defendants' motions further illustrates the problem. At oral argument, the government appeared with

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[3] At oral argument on defendants' Motion for an Evidentiary Hearing and In-Camera Review, Assistant United States Attorney Stephen Higginson stated:

> [Boitmann and Taylor] have been vindicated by the Fifth Circuit. The Fifth Circuit's opinion points out that Judge Sear said there was no prosecutorial misconduct. Three times the Fifth Circuit says that.

Transcript (Doc. #388) at p. 77.

sets of excerpts which it had not previously given to the defendants until moments before the prosecutors began their arguments. During these arguments, defense counselpointed out that in fact the excerpts of several previous opinions were inaccurate. The prosecutors' reproductions of the excerpts were not only made at the last minute, but were misleading.

Accordingly, the court will grant defendants' request for an in-camera review, and hereby orders the government to produce all of the FBI "302" reports and corresponding "rough notes" related to witnesses who testified at trial, along with an appropriate index of these reports. Likewise, the government shall also produce to this court transcripts of the proceedings involving Charles Donaldson in the Middle District of Louisiana, along with the factual basis for his guilty plea in that district. Moreover, the government shall produce to this court transcripts of any and all testimony of Agent Susan Phillips in relation to this case, or in relation to the prosecution of Charles Donaldson in the Middle District of Louisiana, including any grand Jury testimony in either case.[4]

Moreover, this court will also require the prosecutors in this case to certify that they themselves have reviewed all of the materials within the government's possession in connection with the investigation of this case and that they have determined that *Brady* materials which were not disclosed to the defendants before or during trial do

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[4] The government need not produce Agent Phillips' trial testimony in this case, as that testimony is already in the Court's possession.

not exist. The government shall make this certification and produce the ordered materials for in-camera inspection, within twenty days of the issuance of this order, or show good cause why it cannot do so. Following the government's certification or presentation of good cause for failing to make this certification, and the court's in-camera inspection, the court will determine the need for any further evidentiary hearing and the scope of any such hearing in order to issue its ruling on all of the outstanding motions in this matter.

New Orleans, Louisiana, this 5 day of June, 1998.

/s/
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURTS OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30652
USDC# 95-CR-106-S

In Re: UNITED STATES OF AMERICA,

Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

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August 27, 1998.

Before DAVIS, JONES, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED WITHOUT PREJUDICE, based on this Court's clarification that (1) the remand after the previous appeal was intended to allow the district court to address narrow questions based solely on the already-developed trial court record; and (2) this proceeding does not deal with the motion for new trial based on newly discovered evidence, which is not before this court.

APPENDIX G

UNITED STATES COURTS OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-30652

In Re: UNITED STATES OF AMERICA,

Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

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September 28, 1998.

Before DAVIS, JONES, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petitioner's motion for clarification of this Court's order filed August 27, 1998, is GRANTED, and on further consideration, the government's motion for mandamus is GRANTED.

The panel opinion in this case resolved all pertinent questions related to the testimony of Donaldson and Moore and the government's alleged failure to turn over or belated disclosure of *Brady* materials. No further proceedings on these matters as raised in the motion for new trial were necessary in light of this court's mandate. We reiterate that (1) the remand after the previous appeal was intended to allow the district court to address the narrow questions specified in Section V of the panel

opinion based solely on the already-developed record; and (2) this order does not deal with the motion for new trial based on newly discovered evidence, which is not before this court.

APPENDIX H

UNITED STATES of America, Plaintiff-Appellant,

v.

Michael O'KEEFE, Sr., Eric Schmidt, John O'Brien, and Gary Bennett, Defendants-Appellees.

No. 99-30027.

United States Court of Appeals,
Fifth Circuit.

March 9, 1999.

Stephen A. Higginson, Asst. U.S. Atty., New Orleans, LA, for Plaintiff-Appellant.

Richard T. Simmons, Jr., Hailey, McNamara, Hall, Larmann & Papale, Metairie, LA, for O'Keefe.

John R. Martzell, Martzell & Bickford, New Orleans, LA, for Schmidt.

Bruce Charles Ashley, New Orleans, LA, for O'Brien and Bennett.

Appeal from the United States District Court for the Eastern District of Louisiana; Mary Ann Vial Lemmon, Judge.

Before HIGGINBOTHAM, JONES and DENNIS, Circuit Judges.

BY THE COURT:

It is ordered that the motion of appellant for temporary stay pending appeal is GRANTED.

DENNIS, Circuit Judge, dissents for the reasons attached.

DENNIS, Circuit Judge, dissenting:

The defendants applied to the district court to continue bail pending their appeals from their convictions and sentences for mail and wire fraud and related offenses. The district court granted their applications, and the defendants were released after posting bonds of $1 million (O'Keefe), $500,000 (Schmidt), $500,000 (O'Brien) and $250,000 (Bennett). The government appealed from the district court's order as authorized by 18 U.S.C. § 3731.

Rule 9(b) of the Federal Rules of Appellate Procedure provides that "[a]pplication for release after a judgment of conviction shall be made in the first instance in the district court." In reviewing the district court's decision, a court of appeals is free to make an independent determination on the merits of the prisoner's application. *United States v. Clark*, 917 F.2d 177, 179-80 (5th Cir. 1990); *United States v. Hawkins*, 617 F.2d 59 (5th Cir.), *cert. denied*, 449 U.S. 952, 101 S. Ct. 355, 66 L.Ed.2d 215 (1980); *United States v. Provenzano*, 605 F.2d 85, 92-93 (3rd Cir. 1979). However, the district court's conclusion is entitled to "great deference." *Harris v. United States*, 404 U.S. 1232, 1232, 92 S.Ct. 10, 30 L.Ed.2d 25 (1971); *United States v. Oliver*, 683 F.2d 224, 235 (7th Cir. 1982); *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979); *United States v. Provenzano*, 605 F.2d at 91-92. *See United States v. Crabtree*, 754 F.2d 1200 (5th Cir. 1985).

To obtain release pending appeal, a convicted defendant must establish four factors: (1) that he is not likely to flee or pose a danger to the safety of others; (2) that the appeal is not for purpose of delay; (3) that the appeal

raises a substantial question of law or fact; and (4) that the substantial question, if decided favorably to the defendant, is likely to result in reversal, in an order for a new trial, in a sentence without punishment, or in a sentence with reduced imprisonment. 18 U.S.C. § 3143(b). *United States v. Clark*, 917 F.2d at 179. In its order admitting the defendants to bail pending appeal, the district court found that the defendants passed all four prongs of this test. Reviewing the district court's written reasons and oral statements at the hearing on this issue with deference, and independently reviewing relevant portions of the record of the trial and post-trial proceedings, I concur with the district court's determinations, and would affirm the district court's judgment admitting the defendants to bail pending their appeals.

In the present case, the only prong of the four-part test that is problematic or that warrants any discussion is the third one: whether the defendants' appeals raise a substantial question of law or fact, i.e., " 'one of more substance than would be necessary to a finding that it was not frivolous[;] . . . a "close" question or one that very well could be decided the other way.' " *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)).

I.

After the jury convicted the defendants of conspiracy, wire fraud, mail fraud, and money laundering, the trial judge, in the same order in which he recused himself, granted the defendants' motion for a new trial; several

weeks later, he denied the government's motion for reconsideration. The government filed an interlocutory appeal under 18 U.S.C. § 3731 contesting the trial judge's new trial order and contending that the trial judge's order denying the government's motion for reconsideration was void because of his prior order disqualifying himself in the case. In *O'Keefe I*, a panel of this court held that the district court judge erred in performing a discretionary act by ruling on the motion for reconsideration after he had recused himself, but that the error did not have to be vacated because it was "harmless."[1] *O'Keefe I*, 128 F.3d at 891, 892-93. The *O'Keefe I* panel then proceeded to review the district judge's ruling on the defendants' motion for new trial on the merits. The panel concluded that the judge's ruling constituted an abuse of discretion or legal error in that (i) the government's knowing failure to correct perjured testimony did not violate the defendants' due process rights under *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959), because the falsehoods were not material, i.e., there was not "a reasonable probability that the jury would have

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[1] The panel concluded that "harmless error" existed because: (i) little risk of injustice would result from not vacating the denial of the motion for reconsideration and remanding the case to the successor judge, who had been assigned the case, for a decision on the government's reconsideration motion; (ii) a decision on the merits of the trial judge's granting of the defendants' motion for new trial would serve justice in other cases because it would clarify an unclear area of the law and admonish district judges as to the importance of taking no discretionary actions after recusal; and (iii) there is little risk of undermining the public's confidence in the judicial process. *O'Keefe I*, 128 F.3d at 892-93.

reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in [the prosecution witness] Donaldson's testimony," *O'Keefe I*, 128 F.3d at 898; (ii) in the absence of a material *Napue* violation, the trial judge's additional findings, viz., that the government impermissibly delayed the disclosure of *Brady* material, that the inconsistencies in prosecution witness Moore's testimony clouded or weakened the government's case, and that the prosecution attempted to mislead the defense by changing the indictment, were insufficient to warrant the granting of a new trial in the "interests of justice" under Fed.R.Crim.P. 33.[2]

II.

The government contends that the defendants' appeal cannot raise any "substantial issue of law" with respect to government misconduct and perjury by prosecution witnesses because any such purported issue is foreclosed by the law of the case doctrine. The government argues that *United States v. O'Keefe*, 128 F.3d 885 (5th

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[2] The *O'Keefe I* panel also found that two of the additional findings were inherently flawed: (i) the government's delay in disclosing the FBI 302 reports of investigative interviews of the two key prosecution witnesses, Donaldson and Moore, containing exculpatory evidence, did not violate *Brady* by impairing defendants' ability to cross-examine those witnesses, based on the panel's review of the record and the absence of any affirmative finding (other than the conclusion) by the district judge to that effect, *O'Keefe I*, 128 F.3d at 898-99; and (ii) even if the prosecution attempted to mislead the defense by redrafting of the indictment, the defense had too much knowledge of the underlying facts to be misled. *Id.* at 895-96, 899.

Cir. 1997) (*O'Keefe I*), decided upon rules of law that will continue to govern the same issues during the defendants' appeal of right from final judgment. However, whether the law of the case doctrine precludes the direct appeal panel from considering such issues is itself a threshold "substantial issue of law." The question of the applicability of the law of the case doctrine is substantial, not only because it is "close" and of more substance than "non-frivolous" questions, but also because it involves novel issues concerning the recusal of judges, harmless error, and the effects of government interlocutory appeals in criminal cases upon defendants' fundamental rights to appeal and to have a full and fair day in court.

As defined by the Supreme Court, the doctrine of the law of the case " 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.' This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' " *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L.Ed.2d 811 (1988) (citing *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L.Ed.2d 318 (1983) and 1B J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 118 (2d ed.1984)).

The law of the case doctrine attaches in interlocutory appeals only upon matters that have actually been decided. As to decisions upon rules of law, the interlocutory appeal establishes the law of the case. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993). Factual determinations in an interlocutory appeal will generally not establish the law of the case. *Id. See* 18

Moore's Federal Practice § 134.20 (3d ed.1998) ("Unlike the doctrine of claim preclusion, the law of the case doctrine does not apply to issues or claims that were not actually decided; for this reason, failure to raise an issue on interlocutory appeal should not operate to preclude the issue on a later appeal from a final judgment, even if other issues were raised by the party or an opponent in a permitted interlocutory appeal.").

The law of the case doctrine applies to an issue that has actually been decided, not to statements made by the court in passing, or stated as possible alternatives, or dictum. 18 *Moore's Federal Practice* §§ 134.20[3], 134.21[2] (3d. ed.1998) (citing, *e.g.*, *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d at 880; *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir.), *cert. denied*, 506 U.S. 981, 113 S. Ct. 484, 121 L.Ed.2d 388 (1992)).

When the law of the case doctrine is applied by a court to its own prior decisions, it is properly characterized as discretionary in nature. 18 *Moore's Federal Practice* § 134.21[1] (3d ed.1998). The doctrine " 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' " *Christianson v. Colt Industries*, 486 U.S. at 817, 108 S. Ct. 2166 (quoting *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L.Ed. 1152 (1912) (Holmes, J.) (citations omitted)). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous

and would work a manifest injustice.' " *Id.* (quoting *Arizona v. California*, 460 U.S. at 618, n. 8, 103 S. Ct. 1382 (citation omitted)).

In this Circuit, we have described the nature of the law of the case doctrine and its exceptions in similar fashion:

> While application of the doctrine is discretionary, this court will generally refuse to revisit a prior panel's decision unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice."

Free v. Abbott Laboratories, 164 F.3d 270, 272-73 (5th Cir. 1999) (quoting *North Mississippi Comms., Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992)). *See United States v. Becerra*, 155 F.3d 740, 752-753 (5th Cir. 1998).

Applying these principles, it is evident that the defendants' appeal and the government's assertion of the law of the case bar raise substantial questions of law with respect to whether the *O'Keefe I* panel committed clear error that will work manifest injustice by (a) holding that a trial judge's legal error in knowingly performing a discretionary judicial act in violation of his own order disqualifying himself under 28 U.S.C. § 455(a) can be "harmless error" that does not have to be vacated; and (b) failing to hold that both of the trial judge's rulings, i.e., his grant of the defendant's new trial motion and his denial of the government's motion for reconsideration, were discretionary acts performed in violation of his disqualification order, that the rulings must be vacated, and

that the case must be remanded for further proceedings before a different judge.

(a)

The trial judge disqualified himself in accordance with 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The *O'Keefe I* panel correctly held that "[o]nce a judge recuses himself from a case, the judge may take no action other than the ministerial acts necessary to transfer the case to another judge, even when recusal is improvidently decided." *O'Keefe I*, 128 F.3d at 891 (citing "*Doddy v. Oxy USA Inc.*, 101 F.3d 448, 457 (5th Cir. 1996) (holding that judge erred in vacating recusal order after recusing herself); *Moody v. Simmons*, 858 F.2d 137, 143 (3rd Cir. 1988) (stating that judge may only perform the 'housekeeping' duties necessary to transfer a case to another judge after recusing himself from a proceeding)").

There is a substantial question, however, whether *O'Keefe I* clearly erred in holding that a trial judge's discretionary rulings in a criminal case in violation of his own order of disqualification can be harmless and may not require his infringing orders to be vacated. Before *O'Keefe I*, this court and other federal courts of appeals had held consistently in both civil and criminal cases that such an error requires the appellate court to vacate the offending discretionary order and to remand the case for

reassignment to a different judge.[3] *See, e.g., Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) ("Once a judge

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[3] *Doddy v. Oxy USA, Inc.*, 101 F.3d 448 (5th Cir. 1996), although problematic, is not inconsistent with the general rule. The trial judge, who owned Exxon stock, recused herself when informed that a corporate party had become affiliated with that company. Later the same day, she vacated the order of recusal and took evidence on the relationship of the two corporations. The evidence indicated that the two corporations had formed a joint venture but that neither Exxon nor the third entity venture could be affected by the litigation. The trial judge referred the question of recusal to the chief judge of the district, who determined that there was no basis for recusal. Under these circumstances, although technically the trial judge performed a discretionary act in vacating her own recusal, the chief judge could and would have vacated the recusal in any event, and her act had no effect upon the parties or the litigation. The trial judge did not deliberately violate her own recusal order by fully stepping back into role of trial judge and taking further discretionary action in disregard or violation of her initial recusal. The trial judge's infraction of § 455, if any, was the kind of "harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance" that the Supreme Court indicated "there is surely room for." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).

Moreover, under 28 U.S.C. § 455(f), added in 1988, after *Liljeberg*, the trial judge in situations like *Doddy v. Oxy USA, Inc., supra*, may be able to avoid disqualifying herself altogether. Section 455(f) provides that if a judge, after substantial judicial time has been devoted to a matter, discovers or is apprised that she has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge divests herself of that financial interest.

In re Continental Airlines Corp., 901 F.2d 1259, 1263 (5th Cir. 1990) is distinguishable because it did not involve a judge's deliberate violation of his own disqualification order.

has disqualified himself, he or she may enter no further orders in the case. His power is limited to performing ministerial duties. * * * A judge who was obliged to recuse acts outside his jurisdiction [or] commits a clear error of law. . . . Mandamus is thus the proper remedy to vacate the orders of a judge who acted when he should have recused."); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956) ("[O]nce having disqualified himself for cause, on his own motion, it was incurable error for the district judge to resume full control and try the case."); *United States v. Feldman*, 983 F.2d 144 (9th Cir. 1992) (A judge cannot order that his recusal from a proceeding be limited to certain aspects or issues of the case. An order denying complete recusal must be vacated and the case reassigned to a different judge.); *McCuin v. Texas Power and Light Co.*, 714 F.2d 1255, 1260-61 (5th Cir. 1983) (A recused judge's order reassigning case to a particular judge must be vacated and the case remanded according to local practice, or in the absence thereof, by the senior active judge.); *El Fenix de Puerto Rico v. The M/Y JOHANNY*, 36 F.3d 136, 141 (1st Cir. 1994) ("As a general rule, a trial judge who has recused himself should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge. . . . [A] recused judge's power is limited to performing [such] ministerial duties . . . " (internal quotation marks and citations omitted)). In fact, in *O'Keefe I* the government relied on these same authorities in urging the appellate panel to vacate the trial judge's denial of the motion for reconsideration as void for having been entered after the judge disqualified himself. Brief for Appellant, *United States v. O'Keefe*, 128 F.3d at 885. Consequently, it is at

least a "close" question of "more substance than would be necessary to a finding that it was not frivolous," whether *O'Keefe I* clearly erred in departing from the precedents of this and all other federal circuits which hold that a trial judge's deliberate performance of a discretionary judicial act in violation of his own order disqualifying himself must be vacated.

There is also a substantial question as to whether *O'Keefe I* clearly erred in concluding that *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988) created a new, special harmless error test for determining whether "any order that a judge issues after the judge has, or should have, recused himself must be vacated." *O'Keefe I*, 128 F.3d at 892. It may be cogently argued that *Liljeberg* does not create a special harmless error test at all; does not expressly or impliedly require, by calling attention to three appropriate equitable considerations for courts to use in determining whether a party should be relieved of a final civil judgment under Fed.R.Civ.P. 60(b)(6) based on a judge's § 455(a) violation, that the same considerations be applied outside of the Rule 60(b) motion context; and certainly does not require or contemplate that Rule 60(b)(6), or those three equitable considerations, be applied in criminal cases.

In *Liljeberg*, a party in a civil case filed a motion under Fed.R.Civ.P. 60(b)(6) to be relieved from a final civil judgment on the ground that the trial judge, during the trial and rendition of the judgment, was, unbeknownst to the movant, a fiduciary of a university having a substantial financial interest in the outcome of the case. On the movant's second appeal to this court, 796 F.2d 796

(5th Cir. 1986); *see also* 747 F.2d 1463 (5th Cir. 1984) (unpublished table decision), we granted the motion to vacate the judgment and remanded the case for a new trial or other further proceedings.

On certiorari, the Supreme Court affirmed. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988). The Court addressed the violation of § 455 by the trial judge and the relief of the judgment debtor from the judgment under Fed.R.Civ.P. 60(b)(6) in separate parts of its opinion.

First, the Supreme Court held that a violation of 28 U.S.C. § 455(a), which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, occurs when a reasonable person, knowing the relevant facts, would expect that a judge knew of the circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances. Moreover, in a proper case, § 455(a) applies retroactively, as well as prospectively, and requires a judge, upon discovering that he performed a discretionary judicial act under circumstances that would cause an objective observer to question his impartiality, to rectify an oversight and to take steps necessary to maintain public confidence in the impartiality of the judiciary. For example, such a judge may be required to disqualify himself retrospectively and to vacate his discretionary judicial action in violation of § 455(a). Here, because there was ample basis in the record to support the findings of the courts below that an objective observer would have questioned the original trial judge's impartially, his performance of discretionary judicial acts at that time was a plain violation of the terms

of § 455(a), even though his failure to disqualify himself was the product of a temporary lapse of memory. *Id.* at 859-61, 108 S. Ct. 2194.

Second, the Court held that under the circumstances of the case the proper remedy for the § 455(a) violation was to grant the Rule 60(b)(6) motion of the judgment debtor to be relieved of the judgment and granted a new trial. I paraphrase most of the pertinent paragraph of the Court's opinion. While § 455 itself does not authorize the reopening of closed civil litigation, Fed. R. Civ. P. 60(b) provides a remedy whereby, in an appropriate case, a party may be relieved of a final judgment. In particular, rule 60(b)(6) grants federal courts authority to relieve a party from a final civil judgment "upon such terms as are just." The Court had "previously noted that it provides courts authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,' *Klapprott v. United States*, 335 U.S. 601, 614-15, 69 S. Ct. 384, 93 L.Ed. 1099 (1949) [civil immigration case], while also cautioning that it should only be applied in 'extraordinary circumstances,' *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L.Ed. 207 (1950) [same]." *Liljeberg*, 486 U.S. at 863-64, 108 S. Ct. 2194. After setting forth these precepts, the Court concluded that pertinent paragraph as follows:

> Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that in determining whether a judgment should be vacated [under Rule 60(b)(6)] for a violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the

> risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id. at 864, 108 S. Ct. 2194 (emphasis added).

It may be forcefully argued that, when the underlined sentence above is read in the context of the paragraph in which it occurs and of the opinion as a whole, the reader should understand that the sentence is intended to apply in the context of deciding a motion to relieve a party of a civil judgment under Rule 60(b)(6) and that the bracketed words, "under Rule 60(b)(6)," are implicitly included in the sentence. If so, it is evident that underlined sentence merely sets forth some equitable principles that the Court deemed appropriate for consideration in determining whether a § 455(a) violation creates "extraordinary circumstances" warranting the relief of a party from a final civil judgment under Fed. R. Civ. P. 60(b)(6). It is well recognized that a motion for relief from a civil judgment under Rule 60(b) is addressed to the discretion of the court, *e.g.*, *Hand v. United States*, 441 F.2d 529 (5th Cir. 1971)(tax refund case); *Simons v. Gorsuch*, 715 F.2d 1248 (7th Cir. 1983); *Clarke v. Burkle*, 570 F.2d 824 (8th Cir. 1978), and that equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b). *Bros Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963); *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 756 (8th Cir. 1996).[4]

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[4] *See* 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2857, at 254-57 (2d ed.1995). "A number of cases say that discretion ordinarily should incline toward granting rather than denying relief,

In reviewing this court of appeals' decision in *Liljeberg* to grant the Rule 60(b)(6) motion to vacate the judgment on the basis of the trial judge's § 455(a) violation, the Supreme Court used several traditional equitable considerations, as well as the three it had said were appropriate, to determine whether relieving the movant from the final civil judgment under Rule 60(b)(6) was the proper remedy for the trial judge's violation. Of the equitable factors customarily used by courts in deciding 60(b) motions, the Supreme Court considered whether there had been a timely request for relief, whether a showing of special hardship by reason of reliance on the original judgment had been made, or whether the delay in seeking relief was to any extent due to the fault of the Rule 60(b) movant. *Liljeberg*, 486 U.S. at 868-69, 108 S. Ct. 2194; *See* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2857, at 256-62 (and cases cited therein); § 2866, at 381-92 (and cases cited therein). The Supreme Court did not suggest that there had been an error in the court of appeal's decision that needed to be reviewed under a harmless error rule. The words "harmless" and "error" do not appear in this part of the opinion. *Liljeberg*, 486 U.S. at 868-70, 108 S. Ct. 2194. In approving of the court of appeal's decision, the Supreme Court called it "an eminently sound and wise disposition of this case," *id.* at 870, 108 S. Ct. 2194, not one that was free of "harmless error." Thus, the Court's

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especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. The policy of the law to favor a hearing of a litigant's claim on the merits must be balanced against the desire to achieve finality in litigation." *Id.* at 255-57. (footnotes omitted).

opinion as a whole clearly indicates that the three factors it mentioned as "appropriate to consider" were not meant to be used as a freestanding "harmless error" rule, but as a non-exclusive list of equitable considerations, which courts may use along with other established equitable precepts, to guide sound and wise exercise of judicial discretion in deciding Rule 60(b)(6) motions based on § 455 violations.

Consequently, there is at least a "substantial" or "close" question whether *O'Keefe I* was clearly mistaken in reading the three appropriate considerations mentioned in *Liljeberg* in isolation as creating a new special freestanding "harmless error" rule, not confined to the context of Rule 60(b)(6) motions, but applicable to all civil and criminal cases involving § 455 violations. Such a broad, discretionary "harmless error" rule would be radically different in language, focus and purpose from the harmless error rules of Fed. R. Civ. P. 61 and Fed. R. Crim. P. 52(a).[5] Furthermore, there is a substantial question

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[5] In general terms, harmless error analysis usually calls upon a reviewing court, either trial or appellate, to set aside a verdict or to disturb a judgment when an error affects the substantial rights of the unsuccessful party, and to disregard any error which does not, leaving the judgment undisturbed. *See* Fed.R.Civ.P. 61 and Fed.R.Crim.P. 52(a). It is doubtful that any verbal formulation can avoid the subjectivity that necessarily inheres in determining whether an error has affected the substantial right of a party. 11 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 2883, at 445-46 (2d ed.1995). Two of the best short attempts have been made by Judge Traynor and Justice Rutledge. *See* Roger Traynor, *The Riddle of Harmless Error 35* (1970) ("[U]nless the appellate court believes it highly probable that the error did not affect the

whether *O'Keefe I* was clearly in error because it applied the equitable factors in the underscored sentence, not as a harmless error rule, but as a talisman giving it the extraordinary power and discretion to skip over affirming or vacating the trial judge's ruling on the motion to reconsider to review on the merits the trial judge's granting of a new trial.[6]

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judgment, it should reverse."); and *Kotteakos v. United States*, 328 U.S. 750, 760, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946) (Rutledge, J.) ("Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects."), cited in 11 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 2883, at 445-47. Thus, a harmless error determination is concerned mainly with whether an error has affected the outcome of a case to the substantial disadvantage of the losing party.

On the other hand, exercising discretion in deciding whether to relieve a party from a final civil judgment under Rule 60(b)(6) because of a judge's § 455(a) violation does not involve a determination of whether the violation affected the outcome of the case. Instead, it involves the consideration of a more complex constellation of factors, including the impact that denying or granting relief will have upon the values of justice for both parties, the deterrence of judicial misconduct, the appearance of justice and the integrity of the courts. Consequently, the considerations mentioned in *Liljeberg*, i.e., risks of injustice to the parties, injustice in other cases, and the undermining of confidence in the courts, are pertinent and useful to the exercise of judicial discretion under Rule 60(b)(6) and § 455, but they are not particularly relevant or helpful to a harmless error determination.

[6] The harmless error rule calls upon a reviewing court to (1) disregard a harmless error, viz., one that does not really hurt the complaining party or affect the outcome of the judgment or order complained of, and (2) leave undisturbed, i.e., to affirm, an order or judgment affected only by harmless error. *See* 11

Although the Supreme Court's *Liljeberg* opinion refers to harmless error in passing at one point, it may be argued that it is highly doubtful that the court intended to establish a new or special harmless error rule for all cases involving § 455 violations. At the end of Part III, in which the Court analyzed § 455 and concluded that the trial judge in *Liljeberg* plainly violated the statute, the Court added:

> A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. (FN9) There need not be a draconian remedy for every violation of § 455(a). It would

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Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2883; 12 *Moore's Federal Practice* § 61.02 (3d ed.1998). *O'Keefe I* used the equitable factors to take the first step in applying a harmless error rule by disregarding the trial judge's error of law in violating his own disqualification order, but *O'Keefe I* did not follow through with the second step required by a harmless error rule, i.e., *affirming* the trial judge's ruling on the motion for reconsideration and remanding for further proceedings. Instead, *O'Keefe I* left the second part of its so-called harmless error operation undone, skipped over the usual step of affirming an order or judgment free of harmful error, to a review of the merits of the trial judge's ruling on the motion for a new trial. Based on that merits review *O'Keefe I* vacated the new trial order and, sub silentio, vacated the trial judge's ruling on the motion to reconsider that it had earlier found to be affirmable as harmless error, and denied the defendant's motion for new trial on the merits and with prejudice. Thus, the convolutions and non sequiturs involved in *O'Keefe I*'s application of what it mischaracterized as a harmless error rule underscore that there is a substantial question as to whether that panel's decision was clearly erroneous.

> be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges.

Liljeberg, 486 U.S. at 862, 108 S. Ct. 2194. In footnote 9 the Court stated that "[l]arge, multidistrict class actions, for example, often present judges with unique difficulties in monitoring any potential interest they may have in litigation." *Id.* at 862 n. 9, 108 S.Ct. 2194. In this connection the Court cited *Union Carbide Corp. v. U.S. Cutting Service, Inc.* 782 F.2d 710, 714 (7th Cir. 1986); *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1080 (D.Ariz.1981), large class actions in which the trial judges discovered for the first time, well into the litigation, that each of their spouses owned a relatively small amount of securities in a member of the class. These cases, however, hinged upon potential § 455(b)(4) (financial conflict of interests) violations rather than § 455(a) (appearance of partiality) infractions. Thus, the Court's vague references to "room for error committed by busy judges who inadvertently overlook a disqualifying circumstance," and the lack of need for "a draconian remedy for every violation of § 455(a)," or the wrong of an "absolute prohibition against any relief in cases involving forgetful judges," do not appear to formulate a rule at all. Rather, the comments appear to be a precautionary dictum that, in enforcing § 455(a) & (b), inadvertent violations under extenuating circumstances, as opposed to sheer forgetfulness, may sometimes be disregarded as harmless.

The Court's Part III dictum on harmless error occurs separately and apart from its discussion in Part IV of relieving a party from a final civil judgment under Rule

60(b)(6), in appropriate equitable and extraordinary circumstances, as a remedy for a judge's § 455(a) violation. Part III makes but one mention of Rule 60(b)(6), and it is revealing. In footnote 9, after observing that large, multidistrict class actions often present judges with unique difficulties in monitoring any potential interest they may have in the litigation, the Court said, "[o]f course, notwithstanding the size or complexity of the litigation, judges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside. *See* 28 U.S.C. § 455(c). The complexity of determining the conflict, however, may have a bearing on the Rule 60(b)(6) extraordinary circumstance analysis." *Id.* at 862 n. 9, 108 S. Ct. 2194. The Court did not refer to the Rule 60(b)(6) extraordinary circumstances analysis as a harmless error rule. And the Court did not anywhere suggest that the equitable considerations involved in the Rule 60(b)(6) extraordinary circumstances analysis discussed in Part IV of the opinion may be used in other contexts as a harmless rule. The Court does not regard the two conceptions as fungible; and a very strong argument can be made that courts of appeals should not either.

Finally, there is a substantial question as to whether it was clearly erroneous for *O'Keefe I* to conclude that the Supreme Court in *Liljeberg*, a civil action, held that Fed. R. Civ. P. 60(b)(6) motions, or the equitable principles appropriate for use in deciding them, may be used to relieve a party of a final judgment or order in a criminal case. Federal Rules of Civil Procedure 1 and 81 provide that those rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity except

those specifically excepted. Federal Rule of Civil Procedure 60(b), therefore, simply does not provide for relief from a judgment in a criminal case. *See United States v. Mosavi*, 138 F.3d 1365, 1366 (11th Cir. 1998). A criminal conviction can be attacked by motion under 28 U.S.C. § 2255, but only for errors of constitutional dimension. *See* 13A Charles A. Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure*, § 3550 (1998 Supp.).

(b)

Under § 455(a), grounds for a judge to disqualify himself arise whenever his impartiality might reasonably be questioned; and, even if the judge was not aware of the circumstances creating an appearance of partiality when it occurred, once he realizes that the impropriety existed he is called upon to take steps necessary to maintain public confidence in the impartiality of the judiciary; in a proper case, the judge may be obliged to disqualify himself retroactively and to vacate any orders entered during the time that a reasonable person would harbor doubts about the judge's impartiality. *Liljeberg*, 486 U.S. at 860-61, 108 S. Ct. 2194; *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986); *Moody v. Simmons*, 858 F.2d 137 (3d Cir. 1988); *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

In the present case, the trial judge's 82 page written memorandum and order contains both his order granting defendants' motion for a new trial and his order recusing himself from the case. The memorandum and order clearly indicates that the trial judge formed the intention to grant the new trial and to recuse himself either during

the oral argument on the motion for new trial or at some time before the written order was prepared and filed. The trial judge's written memorandum and order states: "Although based on the extensive briefs filed by all the parties I was prepared to deny the defendants' motion for a new trial, following oral argument I am now persuaded that a new trial is the proper remedy under the circumstances." Memorandum and Order at 80 (footnote omitted). In its Conclusion, the memorandum and order provides:

> The defendants have been successful in obtaining a new trial. As I said before in addressing the perjury of Charles Donaldson, prior to oral argument I was not inclined to grant this remedy. I believed that the jury, which performed its duty so diligently, had been apprised of all relevant information required to reach a verdict. At oral argument it became apparent that such was not the case.
>
> Because of the sensitive nature of the court's inquiry concerning conduct of government counsel, the court's personal participation and questioning of counsel in connection with that inquiry, and the findings of the court resulting from that inquiry, the court feels compelled to recuse itself from further handling of this matter in accordance with 28 U.S.C. § 455.
>
> Accordingly,
>
> IT IS ORDERED that the defendants' motion for new trial is GRANTED. (Signature omitted).

Id. at 81-82.

Thus, it is evident that the trial judge's inquiry of a "sensitive nature" into the conduct of the government

attorneys at the oral argument on the new trial motion, the judge's "personal participation and questioning of counsel" during that inquiry, and the judge's findings resulting from the inquiry, caused the trial judge to decide that he could no longer maintain impartiality, that he should recuse himself, and that a new trial should be granted.

Consequently, the defendants' appeal raises a substantial question as to whether *O'Keefe I* clearly erred in finding or assuming that the trial judge's decision and order on the new trial motion distinctly preceded the grounds for his recusal under § 455. The judge's written memorandum and order indicates that he probably decided that he should disqualify himself before the order was prepared in final form or certainly before it was actually signed and filed. Consequently, the possible influence of the judge's reasons for disqualification upon his decision of the new trial motion is clearly evident. As a practical matter, the trial judge's new trial and recusal rulings cannot be hermetically separated either temporally or in substance.

Moreover, because of the judge's recounting of the events and his mental impressions in his written memorandum and order, it would appear to a reasonable person that the judge lost his ability to maintain his impartiality prior to his granting of the new trial, and that the judge realized that his impartiality at the time he granted the new trial might reasonably be questioned. Accordingly, this is a proper case for the retroactive application of § 455. The trial judge had a duty to make his disqualification retroactive so as to precede his granting of the new trial and to vacate both his new trial and

denial of reconsideration order. Accordingly, there is a substantial question whether *O'Keefe I* clearly erred in not recognizing the pervasiveness of the trial judge's violations of § 455, in not vacating both his granting of the new trial and his denial of the motion to reconsider, and in not remanding the case to a different judge to consider the defendants' motion for a new trial anew, shorn of the disqualified judge's vacated orders.

(c)

Consequently, the defendants' appeal raises substantial questions as to whether *O'Keefe I* clearly erred in reaching the merits of the trial judge's granting of the new trial and in deciding upon the rules of law it adopted in that merits review. Thus, it would clearly cause manifest injustice to the defendants to preclude them, on the basis of a flawed law of the case application, from presenting in their appeal all of their substantial arguments that constitutional errors and defects in the trial affected their substantial rights and the judgment of the jury.

There is a substantial argument that *O'Keefe I*'s clearly erroneous interlocutory appellate intervention into the merits of this criminal case during a government appeal would, under improper application of a law of the case bar, make for truncated presentation of the defendants' issues in their own appeal and risk a failure to have a complete appellate determination of the true nature and seriousness of alleged errors based on all of the evidence and a full and fair opportunity for argument by the parties. Consequently, manifest injustice will result if the defendants are denied a full consideration of their

constitutional claims and a full vindication of their constitutional rights on direct appeal.

III.

If the direct appeal panel decides that it is not bound by *O'Keefe I* under the law of the case doctrine, the defendants' appeal raises substantial questions of law or fact which, are, additionally, so integral to the merits of the convictions, on all counts for which imprisonment has been imposed, that an appellate ruling for the defendants on any of those substantial questions would be likely to require a reversal of the conviction or a new trial. 18 U.S.C. § 3143(b)(2); *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985).

The primary substantial question of law raised for appeal is whether the government obtained the defendants' convictions through use of perjury and other false evidence, known to be such by the government's representatives, that the government knowingly allowed to go uncorrected during the jury trial in which it appeared.

A principal element of the prosecution theory was that the defendants, under the leadership of Michael O'Keefe, Sr., caused a domestic insurer, Physicians National Risk Retention Group (PNRRG), which they managed, to enter a sham reinsurance contract with a foreign insurer, Builders and Contractors Insurance (BCI), managed by Charles Donaldson, who later became a key prosecution witness. One crucial issue in the case was whether the defendants had foreknowledge that Donaldson had no authority to enter the contract for BCI from its

owners or directors. An FBI agent's report of her interview of Donaldson, after he agreed to cooperate in the investigation of the defendants, related that Donaldson said that Michael O'Keefe, Sr., had "suggested [to Donaldson] that BCI's shareholders meeting minutes be altered [by Donaldson] to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract." Donaldson FBI 302 Report, quoted in *O'Keefe I*, 128 F.3d at 888. The government's attorneys placed this same statement in the factual basis for Donaldson's guilty plea in another district court to one count of mail fraud in exchange for his testimony against the defendants. *Id.* In that guilty plea proceeding the FBI agent testified that the factual basis accurately reflected what Donaldson had said in his interview and Donaldson testified that the factual basis accurately set forth what transpired between him and Mr. O'Keefe. Trial Transcript (Cross Examination of Charles Donaldson), March 12, 1996, at 110.

During Donaldson's direct testimony in the present case, the prosecuting attorneys did not ask Donaldson any questions about his alteration of the BCI shareholders' meeting minutes. Immediately prior to Donaldson's direct examination by the government's attorneys, the prosecution handed a copy of the FBI 302 report to the defense. During cross-examination, Donaldson at first denied that he had ever said that O'Keefe had suggested that Donaldson should alter the BCI minutes. Later during the cross-examination, however, Donaldson testified that he had told the FBI agent that O'Keefe suggested that he alter the minutes and that it was a false statement. Still later on cross, Donaldson testified that during his guilty plea proceeding in Baton Rouge, the FBI

agent had taken the stand and, in giving the factual basis for his plea, repeated the false statement that Michael O'Keefe, Sr., had acted with Donaldson to alter the BCI minutes. Donaldson also testified in the present case that the FBI agent's testimony at his guilty plea proceeding was correct. Trial Transcript (Cross Examination of Charles Donaldson) at 110.

A conviction obtained through use of false evidence, known to be such by representatives of the government, must fall under the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959) (citing *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791 (1935)). *See Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)(false "blood" on shorts). " '[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' " *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S. at 269, 79 S. Ct. 1173); *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976). " 'It is of no consequence that the falsehood bore on the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in anyway relevant to the case, the district attorney has the responsibility and the duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.' " *Napue*, 360 U.S. at 269-70, 79 S. Ct. 1173 (quoting *People v. Savvides*, 1 N.Y. 2d 554, 154 N.Y. S.2d 885, 136 N.E. 2d 853, 854-55 (1956)).

A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *United States v. Bagley*, 473 U.S. 667, 678-79, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S. at 271, 79 S. Ct. 1173); *Kirkpatrick v. Whitley*, 992 F.2d 491 (5th Cir. 1993). The fact that the jury was apprised of other grounds for believing that the government witness may have had an interest in testifying against the defendant does not turn what was otherwise a tainted trial into a fair one. *Napue*, 360 U.S. at 270, 79 S. Ct. 1173.

The government's attorneys, in a sidebar conference during the trial, at oral argument on the motion for a new trial, and in affidavits filed with the motion for reconsideration, took the position that Donaldson had never told the FBI that O'Keefe urged him to alter the BCI minutes, that the FBI agent who interviewed Donaldson mistakenly thought Donaldson had accused O'Keefe of complicity in the alteration of the BCI minutes, that the FBI agent attributed that incorrect statement to Donaldson in the written FBI 302 report of the interview, that the government attorneys in New Orleans became aware of the false statement in the 302 prior to Donaldson's arraignment, and that the government attorneys in New Orleans tried unsuccessfully to correct the false statement before a government attorney in Baton Rouge placed it in the factual basis for Donaldson's guilty plea in the federal court for Middle District of Louisiana. *See* Trial Court's Memorandum and Order (Aug. 15, 1996), at 64-70. Thus, the government was aware before trial that through its own fault Donaldson's 302 FBI statement and guilty plea

factual basis contained a false statement accusing O'Keefe of actively participating in the falsification of the BCI minutes in order to facilitate the BCI/PNRRG reinsurance contract; moreover, the government knowingly did not correct the inaccuracies in the FBI 302 Report prior to making the report available to the defense before Donaldson's testimony. The government was also aware before trial that Donaldson's guilty plea factual basis was of record and accessible to the defendants. Thus, there is a substantial argument that the government knew before trial that there was a reasonable likelihood that the defense would ask Donaldson about the false statement before the jury but that the defense would not know that the false statement originated with the FBI agent's mistake, and not with what Donaldson actually told the FBI agent. Nevertheless, the government did not inform the court or the defense prior to trial or Donaldson's testimony of the true nature of the false statement or its source. The government did not ask Donaldson any questions about the false statement or attempt to correct the 302 or the factual basis during Donaldson's direct testimony. The government did not call the FBI agent or any of its attorneys to explain what was false and elicit the truth. The government was aware that Donaldson perjured himself several times during his cross examination by testifying that he had made the statement to the FBI agent, although he later said he was lying at the time, and although he also testified several times that he did not make the false statement to the FBI agent. Nevertheless, the government knowingly did not ever in open court before the jury correct or explain Donaldson's perjurious

testimony or the false statement in the 302 or the factual basis.

Applying the constitutional principles set forth by the Supreme Court in the cases cited above, it is clear that defendants' appeal raises a substantial question whether their convictions and sentences must fall under the Fourteenth Amendment because (1) they were obtained through the use of perjured testimony and false evidence, known to be such by representatives of the government, *Napue v. Illinois*, 360 U.S. at 269, 79 S. Ct. 1173; *Miller v. Pate*, 386 U.S. 1, 7, 87 S. Ct. 785, 17 L.Ed.2d 690 (1967); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir.), *cert. denied*, 519 U.S. 995, 117 S. Ct. 487, 136 L.Ed.2d 380 (1996); *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998); (2) although the government may not have directly solicited the perjury or false evidence, it was responsible for the creation of the false statement, knew or should have known that the jury would be exposed to the false statement wrongfully indicating that O'Keefe participated in altering the BCI minutes, and knowingly allowed it to go uncorrected when it appeared before the jury, *Giglio v. United States*, 405 U.S. at 154, 92 S. Ct. 763; *Napue*, 360 U.S. at 269, 79 S.Ct. 1173; *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Faulder v. Johnson*, 81 F.3d at 519; *Pyles v. Johnson*, 136 F.3d at 996; and (3) the perjury and false evidence could in any reasonable likelihood have affected the judgment of the jury. *United States v. Bagley*, 473 U.S. at 678-79, 105 S. Ct. 3375; *Giglio*, 405 U.S. at 154, 92 S. Ct. 763; *Napue*, 360 U.S. at 271, 79 S. Ct. 1173; *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). *See* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.5, at 534 (1984) ("This obligation [of the prosecutor to

disclose] requires that it not suborn perjury, not use evidence known to be false, and not allow known false testimony of its witnesses to stand uncorrected.").

Consequently, there is a substantial question as to whether *O'Keefe I* clearly erred by applying incorrect principles of law to determine whether the government violated its duty to correct perjury and false evidence and, if so, whether the government's violations were material. In *O'Keefe I*, the court stated that:

> Along with other circuits, we have limited material lies to those that occur as a part of the prosecution's case. The prosecution has a duty only to refrain from knowingly presenting perjured testimony and from knowingly failing to disclose that testimony used to convict a defendant was false. Thus, when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony. [*Id.* at 894 (citations and internal quotations omitted)].
>
> [W]e do not find that there is a reasonable probability that the jury would have reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony. As a result, the falsehoods were not material and no *Napue* deprivation of due process occurred. [*Id.* at 898].

It is arguable that the first *O'Keefe I* statement is clearly erroneous because it is contrary to the decisions of the Supreme Court and to previous panel opinions of this Circuit following the Supreme Court cases. In *Napue* and *Giglio*, both of which involved perjury by a prosecution

witness during his cross-examination by a defense attorney, *see Napue*, 360 U.S. at 267-68 & n. 2, 79 S. Ct. 1173; *Giglio*, 405 U.S. at 153, 92 S. Ct. 763, the Court held that a conviction obtained through use of false evidence, known to be such by representatives of the prosecuting government, must fall as a violation of due process; and that " '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' " *Giglio*, 405 U.S. at 154, 92 S. Ct. 763 (quoting *Napue*, 360 U.S. at 269, 79 S. Ct. 1173). Prior to *O'Keefe I* this Circuit has consistently followed *Napue* and *Giglio*. *See Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998) ("A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected.") (quoting *Faulder*, 81 F.3d at 519 (citing *Napue*)). *See Cordova v. Collins*, 953 F.2d 167, 171 (5th Cir. 1992).

The second *O'Keefe I* statement is also clearly erroneous. The Supreme Court has held that when a *Napue* violation occurs "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury' " *Giglio, supra*, at 154, quoting *Napue, supra*, at 271. Prior to *O'Keefe I* this Circuit's panels adhered to the same materiality standard. *Kirkpatrick v. Whitley*, 992 F.2d at 497 ("[I]f the prosecutor has knowingly used perjured testimony or false evidence, the standard is considerably less onerous [than for Brady violations]: the conviction 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. . . . ' " [citing *Bagley*, 473 U.S. at 679 n. 9, 105 S. Ct. 3375 (citing *Napue*)]); *Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir. 1998) ("It is well

settled that the State is not permitted to present false evidence or allow the presentation of false evidence to go uncorrected. [citing *Giglio, Napue* and *Mooney v. Holohan*]. However, if false evidence is presented by the prosecution at trial, a new trial is warranted only if the false testimony could have, in any reasonable likelihood, affected the jury's determination.").

One panel of this court may not overrule the decision of a prior panel of this court (absent an intervening decision to the contrary by the Supreme Court or the *en banc* court, of which there are none). *Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997); *Barber v. Johnson*, 145 F.3d 234 (5th Cir. 1998).

Consequently, the defendants' appeal raises a substantial question as to whether an application of the correct controlling principles of law set forth in *Napue, Giglio, Pyles, Faulder, Moody* and *Kirkpatrick* by the court on direct appeal should require a reversal of the convictions and a new trial because the government, although not directly soliciting false evidence in court, allowed it to go uncorrected when it appeared in court. It is also cogently arguable that the record on direct appeal will show that the government's violation of due process and the resulting harm to the substantial rights of the defendants were far more grievous than that depicted by the *O'Keefe I* opinion because (i) the government's bad faith, fault or neglect created the false statements in the FBI 302 report and Donaldson's guilty plea factual basis; (ii) the government took no steps to disclose the falsehoods to the court or the defendants, although it became aware of them before trial; (iii) the government was aware of the risk that the false evidence would be referred to by

Donaldson in his testimony at trial before the jury; (iv) when this risk became a reality the government took no steps before the jury to fulfill its duty to correct what it knew to be false and elicit the truth for the trier of the facts; (v) had the government complied with its duty by correcting the false statements prior to trial, the jury would not have received any of the very incriminating false evidence that O'Keefe had personally participated in altering the BCI minutes (including evidence that Donaldson's accusation against O'Keefe had been placed in an official FBI 302 report and that an FBI agent had testified to receiving such a statement from Donaldson in federal court); (vi) had the government complied with its duty, after the false statements were repeatedly mentioned during trial, to apprise the jury of the true facts, (that the statement was false, that Donaldson had never said O'Keefe participated in the fabrication of the BCI minutes, that when Donaldson testified that he had made that statement to the FBI he committed perjury, that the FBI agent was responsible for the creation of the false statement, and that the government knowingly had allowed the trial to go forward without disclosing the false statements to the court or the defendants), the jury might well have concluded that the government had either fabricated evidence or had been highly negligent in its investigation or preparation of the FBI report and the factual basis to which the FBI agent testified to in another federal court. There is a substantial question whether the truth about the government's creation and perpetuation of the false statement likely would have affected the jury by shaking its confidence in the government's whole investigation and prosecution. Also, the jury might well

have concluded that Donaldson was willing to say anything to help the government's case and to damage the defense, and to commit perjury to cover up the government's mistakes. Accordingly, the jury might well have concluded that Donaldson's testimony was thoroughly lacking in credibility or reliability. Thus, there is a substantial question whether there is a reasonable likelihood that the false evidence and testimony affected the judgment of the jury so that a new trial is required.

IV.

The defendants make an additional argument which also appears to raise a substantial question of law or fact. The defendants contend that they have newly discovered evidence that prior to Donaldson's guilty plea, the government allowed $45,000 which did not belong to Donaldson to be deposited to his credit in his lawyer's trust account and withdrawn after Donaldson's guilty plea and used by Donaldson as if it were his own money to pay part of his restitution obligation. The defendants argue that by these transfers, the government gave Donaldson an additional substantial benefit which the government knowingly did not disclose in its plea agreement with Donaldson. In the plea agreement, the government and Donaldson represented that the only benefits he would receive for his plea, cooperation and testimony against other persons were a 3-level decrease in his criminal offense level and a possible recommendation of a downward departure in sentencing. On direct examination at defendants' trial Donaldson identified his written plea agreement and testified that it was the agreement he

had signed with the government. The government elicited from Donaldson the specific benefits he had been granted or promised by the government. The prosecuting attorney did not ask Donaldson, and he did not volunteer any information, about the $45,000 that the government allowed him to use to pay part of his restitution obligation. The defendants contend that the government's introduction of Donaldson's testimony about the plea agreement and the agreement itself, which was introduced as an exhibit in the defendants' trial, contained false statements under oath by Donaldson and government representatives that misled the jury as to the quality and credibility of Donaldson's testimony, and could have in reasonable likelihood affected the judgment of the jury. The defendants contend that the government therefore violated the Fourteenth Amendment under both *Napue* and *Brady* by presenting knowingly uncorrected perjury and false evidence at trial and failing to disclose impeachment evidence to defendants.

In this regard, a further substantial question of law or fact is raised as to whether *O'Keefe I*'s clearly erroneous intervention into the merits of the case prevented the successor trial judge from allowing the defendants to present substantive evidence in support of their motion for a new trial.

My pretermitting discussion of other questions raised by defendants' appeal does not indicate any opinion as to whether any of these is a substantial question, which if decided favorably to the defendants, would be likely to result in reversal.

Conclusion

Accordingly, I respectfully dissent from the majority's granting of the government's motion to stay the district court's order releasing the defendants on bail pending the government's appeal from that order. I believe the defendants' appeal will raise substantial questions of law and that they should therefore be allowed to remain on bail pending their own appeal. However, I do not intend to intimate how the substantial questions raised by defendants' appeal and the government's argument based on the law of the case doctrine should be decided. It would be inappropriate to express an opinion on the merits of these questions prior to full briefing and presentation to this court on direct appeal. *United States v. Clark*, 917 F.2d 177, 181 (5th Cir. 1990). The present panel's function is merely to decide whether to stay the district court's decision to grant bail pending the government's appeal from the district court's order releasing the defendants on bail pending their own appeal.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30082

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

ERIC SCHMIDT; MICHAEL O'KEEFE, SR.;
JOHN O'BRIEN; GARY BENNETT,

Defendants-Appellants
Cross-Appellees,

PAUL SCHMITZ,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(USDC No. 95-CR-106-2-S)

September 14, 2000.

ON PETITION FOR REHEARING EN BANC

(Opinion 8/11/00, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
Thomas M. Reavley

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-31181

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

ERIC SCHMIDT; MICHAEL O'KEEFE, SR.;
JOHN O'BRIEN; GARY BENNETT; PAUL SCHMITZ

Defendants-Appellees

Appeal from the United States District Court for
the Eastern District of Louisiana
(USDC No. 95-CR-106-2-S)

Dec. 15, 1997.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 11/11/97, 5 Cir., ___ F.3d ___)

Before WISDOM, JOLLY, AND EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED, and no member of this panel nor judge in regular active service of the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/
Emilio M. Garza
United States Circuit Judge

APPENDIX K

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

JAN 5 2001

No. 00-997

In the
Supreme Court of the United States

ERIC SCHMIDT, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT O'BRIEN'S BRIEF IN SUPPORT OF PETITIONERS

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January 2001

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

RESPONDENT JOHN O'BRIEN'S STATEMENT IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 12.6, respondent John O'Brien (party to the judgment below and petitioner in No. 00-896) hereby informs the Court and the parties that he has an interest in the outcome of this proceeding and intends to participate as a party. *See Wilson v. Omaha Tribe*, 442 U.S. 653, 663 n.13, 667 n.17 (1979); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783-84 & n.14 (1980); *Director v. Perini*, 459 U.S. 297, 304-05 & n. 12 (1983). Respondent O'Brien supports the Schmidt petitioners' petition for a writ of certiorari on all the questions presented.

Respectfully submitted,

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January 2001

(3)

Supreme Court, U.S.
FILED
MAY 9 2001
OFFICE OF THE CLERK

No. 00-997

In the Supreme Court of the United States

ERIC SCHMIDT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entitled to a new trial based on a government witness's false or contradictory testimony where the defense exposed the witness's falsehoods during cross-examination and argued to the jury that the witness had been thoroughly impeached.

2. Whether, when a court of appeals conducts plain-error analysis under Federal Rule of Criminal Procedure 52(b) of a claim of legal error that became clear only as the result of an intervening change in the settled law of the circuit, the defendant bears the burden of establishing that he was prejudiced by the error.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Barrientes v. *Johnson*, 221 F.3d 741 (5th Cir. 2000), cert. dismissed, 121 S. Ct. 902 (2001)	12
Brady v. *Maryland*, 373 U.S. 83 (1963)	6
Giglio v. *United States*, 405 U.S. 150 (1972)	9, 10, 11
Johnson v. *United States*, 520 U.S. 461 (1997)	8, 14, 15, 16
Kyles v. *Whitley*, 514 U.S. 419 (1995)	12
Napoli v. *United States*, 45 F.3d 680 (2d Cir.), cert. denied, 514 U.S. 1084 (1995)	15
Napue v. *Illinois*, 360 U.S. 264 (1959)	9, 11
Neder v. *United States*, 527 U.S. 1 (1999)	7
O'Keefe v. *United States*, 523 U.S. 1078 (1998)	2
United States v. *Atkinson*, 297 U.S. 157 (1936)	13
United States v. *Ballistrea*, 101 F.3d 827 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997)	15
United States v. *Baumgardner*, 85 F.3d 1305 (8th Cir. 1996)	17
United States v. *Burch*, 156 F.3d 1315 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999)	10
United States v. *Gaudin*, 515 U.S. 506 (1995)	16
United States v. *Higgins*, 75 F.3d 332 (7th Cir. 1996)	12
United States v. *Joyner*, 201 F.3d 61 (2d Cir. 2000)	10, 11, 12
United States v. *Knoll*, 116 F.3d 994 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998)	17
United States v. *Langston*, 970 F.2d 692 (10th Cir.), cert. denied, 506 U.S. 965 (1992)	10

Cases—Contined: Page

United States v. *Maloof*, 205 F.3d 819 (5th Cir.), cert. denied, 121 S. Ct. 176 (2000) 12
United States v. *Malpeso*, 115 F.3d 155 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998) 15, 18
United States v. *Olano*, 507 U.S. 725 (1993) 13, 14, 15, 16
United States v. *Perkins*, 94 F.3d 429 (8th Cir. 1996), cert. denied, 519 U.S. 1136 (1997) 10
United States v. *Rodriguez*, 162 F.3d 135 (1st Cir. 1998), cert. denied, 526 U.S. 1152 (1999) 12
United States v. *Santiago*, 238 F.3d 213 (2d Cir. 2001) 14-15, 18
United States v. *Santiago*, 798 F.2d 246 (7th Cir. 1986) 10, 11
United States v. *Viola*, 35 F.3d 37 (2d Cir. 1994), cert. denied, 513 U.S. 1198 (1995) 13, 14, 15
United States v. *Walsh*, 75 F.3d 1 (1st Cir. 1996) 12
United States v. *White*, 238 F.3d 537 (4th Cir. 2001) 10

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause) 9
18 U.S.C. 371 2
18 U.S.C. 1341 2
18 U.S.C. 1343 ..... 2, 7
18 U.S.C. 1956(a)(2)(A) 2
Fed. R. Crim. P.:
Rule 24(c) 14
Rule 52(b) 13, 14, 15, 16

In the Supreme Court of the United States

No. 00-997

ERIC SCHMIDT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is unpublished, but the decision is noted at 229 F.3d 1148 (Table). An earlier opinion of the court of appeals (Pet. App. 34a-67a) is reported at 128 F.3d 885. An earlier opinion of the district court (Pet. App. 68a-152a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 14, 2000 (Pet App. 205a-206a). The petition for a writ of certiorari was filed on December 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Eric Schmidt, Michael O'Keefe, Sr., and Gary Bennett were convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Counts 2 and 4); mail fraud, in violation of 18 U.S.C. 1341 (Counts 5-7); and money laundering, in violation of 18 U.S.C. 1956(a)(2)(A) (Counts 14-23). Petitioner Paul Schmitz was convicted of a single mail fraud count (Count 12).[1]

After trial, the district court granted a new trial based on prosecutorial misconduct. On the government's appeal, the court of appeals reversed the new trial order and remanded. Pet. App. 34a-67a. This Court denied certiorari. *O'Keefe* v. *United States*, 523 U.S. 1078 (1998) (No. 97-1542). O'Keefe was later sentenced to 235 months' imprisonment; Schmidt was sentenced to 121 months' imprisonment; Bennett was sentenced to 97 months' imprisonment; and Schmitz received a three-year term of probation. The court of appeals affirmed. Pet. App. 1a-33a.

1. Petitioners and co-defendant John O'Brien (see note 1, *supra*) engaged in a fraudulent scheme to siphon off millions of dollars in assets of Physicians National Risk Retention Group, Inc. (PNRRG), a Louisiana medical malpractice insurer. O'Keefe, who had twice

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[1] Co-defendant John O'Brien was convicted of mail and wire fraud conspiracy, wire fraud, and money laundering. He was sentenced to 121 months' imprisonment and was ordered to pay restitution. O'Brien has filed a separate petition for certiorari that raises an issue substantially identical to the third question presented in the petition in this case. That petition is currently pending before the Court. See *O'Brien* v. *United States*, No. 00-896 (filed Dec. 1, 2000).

been convicted of fraud, was selected to operate Associated Auditors, the management company for PNRRG. Schmidt served as president of PNRRG. O'Brien and Bennett were also involved in the management of PNRRG, and Schmitz was a claims manager. Pet. App. 2a; Gov't. C.A. Br. 7-8, 23.

PNRRG became insolvent, and the State of Louisiana moved to liquidate it. Petitioners and O'Brien arranged to have Builders and Contractors Insurance Limited (BCI), a dormant Bahamian corporation that was controlled by Charles Donaldson, act as a reinsurer. The Louisiana Department of Insurance and the Board of PNRRG approved the reinsurance agreement, based on petitioners' assurances that the reinsurance program would be backed by Sphere Drake, an established reinsurance company with assets in excess of $500 million; that coverage of PNRRG's physicians would continue; and that all future claims would be paid by BCI. Attorney Johnny Moore participated in the negotiation of the reinsurance contract with O'Keefe on behalf of the Louisiana Insurance Department. Pet. App. 2a-3a, 7a, 35a; Gov't. C.A. Br. 7-8, 23-24.

Based on petitioners' representations that the reinsurance program would require additional funding, PNRRG and the Louisiana Department of Insurance authorized the transfer of more than $10 million in cash assets of PNRRG to a trust account of O'Keefe's law firm, with the funds to be held on behalf of BCI. Petitioners and O'Brien entered into a reinsurance contract with Sphere Drake. At O'Brien's direction, however, they canceled the contract a few months later. Neither PNRRG nor the Louisiana Department of Insurance was advised of the cancellation. Petitioners also canceled the insurance coverage of a large number of physicians before the expiration date, and they failed

to pay claims for the insured physicians as promised. Pet. App. 3a; Gov't. C.A. Br. 7-8, 24-26.

Associated Insurance Consultants, Inc. (AIC), a management company owned by O'Brien, Schmidt, and Bennett, signed a management contract to handle the claims and carry out the terms of the reinsurance agreement on BCI's behalf. The insured physicians, the Board of PNRRG, and the Louisiana Department of Insurance were unaware of that management contract, which resulted in AIC's receipt of more than $5 million in profits generated by the cancellation of the Sphere Drake contract, the early cancellation of the physicians' insurance coverage, and the failure to pay claims. Ultimately, that money was diverted to the personal bank accounts of O'Brien, Schmidt, and Bennett. Pet. App. 3a; Gov't. C.A. Br. 25-26, 28-30.

A representative of the Louisiana Department of Insurance testified that the Department would not have entered into the reinsurance agreement if it had known that petitioners intended to cancel physicians' insurance coverage. Pet. App. 10a; Gov't. C.A. Br. 53. An attorney for the Department testified that in approving the reinsurance agreement with BCI, the Department sought a solvent insurer for the plan, and that the Department was not informed of the cancellation of the reinsurance contract with Sphere Drake. *Id.* at 54. Physician PNRRG board members similarly testified to their understanding, based on representations from petitioners, that the agreement would protect doctors. *Ibid.* The physicians also testified that they were unaware of the profit diversion or the cancellation of the Sphere Drake reinsurance contract. *Ibid.*

2. Donaldson and Moore were two of the primary witnesses against petitioners at trial. The Federal

Bureau of Investigation (FBI) prepared a "302 Report" that documented an interview between Donaldson, an FBI agent, attorneys for both Donaldson and the government, and other law enforcement personnel. Pet. App. 36a. According to the report, a participant in the interview stated that "O'Keefe suggested that BCI's shareholders meeting minutes be altered to make it appear that Donaldson had authority to enter into the PNRRG/BCI contract." *Ibid.* The 302 Report did not identify the person who had made the statement, but when Donaldson pleaded guilty in federal court, the prosecutors incorporated the statement into the factual basis of the guilty plea in such a way as to make it appear that Donaldson had made the statement. *Ibid.*

At trial, the government furnished the 302 Report to the defense just before Donaldson testified on direct examination. Pet. App. 36a-37a. On direct examination, the government did not ask Donaldson any questions about the minutes. *Id.* at 37a. On cross-examination, Donaldson first appeared to deny, but ultimately admitted, that he had falsely accused O'Keefe of participating in the alteration of the minutes. *Id.* at 37a & n.2. Petitioners subsequently moved to strike Donaldson's testimony, but the district court overruled the objection. *Id.* at 38a-39a. In their closing argument, petitioners emphasized that in their view Donaldson's testimony had been successfully impeached, and they urged the jury not to credit that testimony. *Id.* at 39a, 57a-58a & n.10.

After petitioners had been found guilty by the jury, the district court granted a new trial on the ground of prosecutorial misconduct. The court concluded that Donaldson had perjured himself both before and during trial and that the prosecutors had known of the perjury. The court also found that the government had failed to

comply with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963); that changes in Johnny Moore's testimony at trial had become significant in light of Donaldson's false testimony; and that the government had redrafted the indictment in an attempt to mislead the defense. Pet. App. 39a-40a; see *id.* at 68a-152a.

3. The court of appeals reversed and remanded. Pet. App. 34a-67a. The court stated that Donaldson's falsehoods, "to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution. Once those falsehoods emerged, the defense had total leeway in cross-examining Donaldson and used the information provided by the prosecution to powerful effect." *Id.* at 56a. The court stressed that the defense had "ably exploited" the 302 Report to impeach Donaldson. *Id.* at 57a. Even if the government had a duty to correct any falsehoods that were not corrected by Donaldson himself, the court stated, "any attempt by the prosecution to intercede during this cross-examination would have actually harmed the defense by depriving the jury of the full, dramatic effect." *Ibid.*

The court of appeals determined that Donaldson's "falsehoods were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." Pet. App. 57a. The court noted that petitioners had made the impeachment of Donaldson "the centerpiece of their closing arguments," and that the district court had "included a strong cautionary statement in the jury instructions." *Id.* at 58a. The court also observed that "the testimony of Donaldson was overwhelmingly corroborated by other witnesses, and the falsehoods occurred on collateral matters." *Id.* at 60a. The court of appeals concluded that there was no "reasonable probability that the jury would have

reached a different outcome even had it been fully aware of all of the alleged inconsistencies and falsehoods in Donaldson's testimony." *Id.* at 62a; see *id.* at 60a ("given the degree of impeachment of Donaldson on the stand, any further impeachment * * * would merely have been cumulative").[2]

4. On remand, the district court reinstated the convictions after denying petitioners' remaining claims for reversal. The court of appeals affirmed. Pet. App. 1a-33a. During the pendency of the appeal in this case, this Court held in *Neder* v. *United States*, 527 U.S. 1 (1999), that materiality is an element of wire fraud under 18 U.S.C. 1343. On appeal, petitioners and co-defendant O'Brien contended that the district court had failed to submit the question of materiality to the jury and that the omission required reversal of their convictions.

The court of appeals agreed that the jury instructions had not clearly identified materiality as an essential element of the mail and wire fraud offenses. Pet. App. 17a.[3] The court stated, however, that in the absence of

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[2] The court of appeals also ruled that the district court had abused its discretion in finding that the government had changed the indictments to mislead the defense. Pet. App. 55a-56a. The court of appeals further held that the district court's remaining findings of government misconduct were untenable in light of the reversal on the perjury claim. *Id.* at 62a-66a.

[3] The court explained:

> As the government points out, there is some language in the jury instructions regarding materiality, such as the instructions that intent to defraud may be found "from a material misstatement of fact made with reckless disregard of the facts," and that "[a] statement * * * or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals

a timely objection at trial, the omission of that element was reviewable only for plain error. *Ibid.* (citing *Johnson* v. *United States*, 520 U.S. 461, 463-466 (1997)). Under the plain-error standard, the court explained, an appellant must establish error that is "plain" and affects his "substantial rights." *Ibid.* "Even if these requirements are met," the court of appeals observed, "an appellate court may in its discretion correct a plain error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 17a-18a (citing *Johnson*, 520 U.S. at 467). The court held that petitioners had not established reversible error under that standard because the evidence would support a jury finding that the misrepresentations and omissions were in fact material:

> Defendants do not show that the inclusion of a materiality instruction in the already complex charge would have altered the outcome of the jury's deliberations. While defendants put on a vigorous defense, the jury obviously accepted the government's theory that defendants schemed to fraudulently siphon off the assets of PNRRG from the inception of their dealings with PNRRG and the [Department of Insurance]. There was clear evidence of materiality.

Id. at 18a.

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a material fact, provided it is made with intent to defraud." However, the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes. Defendants did not object to the trial court's failure to so instruct the jury.

Pet. App. 17a.

ARGUMENT

1. Petitioners contend (Pet. 12-27) that the court of appeals erred in the earlier appeal by reversing the district court's order granting a new trial. They maintain that the decision below conflicts with decisions of other courts because it (a) does not require the government to correct the false testimony of its witnesses on cross-examination and (b) applies an unduly restrictive standard of materiality to determine when the introduction of perjured testimony at trial requires reversal. This case differs from those on which petitioners rely, however, because petitioners exposed the witness's false testimony at trial and argued to the jury that the witness was thoroughly impeached. Further review is therefore unwarranted.

a. In *Napue* v. *Illinois*, 360 U.S. 264 (1959), the principal government witness in a murder trial falsely testified that the prosecutor had not promised him any consideration in exchange for his testimony. The prosecutor did not correct the false testimony at trial. This Court reversed, holding that a conviction obtained through the use of false testimony violates the defendant's rights under the Due Process Clause. *Id.* at 269. The Court stated that the same result obtains when the government, although not soliciting false evidence, allows it to go uncorrected when it appears. *Ibid.* The Court also held that reversal of the defendant's conviction is required if there is "any reasonable likelihood" that the false testimony affected the jury's verdict. *Id.* at 271.

In *Giglio* v. *United States*, 405 U.S. 150 (1972), the government's only witness linking the defendant to the charged forgery offense testified on cross-examination that he had not been offered leniency by the govern-

ment. *Id.* at 151-152. The prosecutor did not correct that testimony. *Id.* at 152. After trial, it was revealed that another prosecutor had offered a deal to the witness in exchange for his testimony. *Ibid.* Relying on *Napue*, this Court reversed, stating that the witness's credibility was important and that the jury was entitled to know of any consideration given to the witness by the government. *Id.* at 154-155.

Based on *Napue* and *Giglio*, the courts of appeals have held that a defendant's due process rights are violated if a critical government witness testifies falsely, either on direct or on cross-examination; the prosecutor does not correct the false testimony; and there is a reasonable likelihood that the false testimony affected the outcome of the trial. See, *e.g.*, *United States* v. *White*, 238 F.3d 537, 540 (4th Cir. 2001); *United States* v. *Burch*, 156 F.3d 1315, 1328 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999). On the other hand, the courts of appeals agree that no due process violation occurs if a government witness provides false or contradictory testimony, but the defense exposes the falsity or contradiction on cross-examination. See, *e.g.*, *United States* v. *Joyner*, 201 F.3d 61, 82 (2d Cir. 2000); *United States* v. *Perkins*, 94 F.3d 429, 432-433 (8th Cir. 1996), cert. denied, 519 U.S. 1136 (1997); *United States* v. *Langston*, 970 F.2d 692, 700-701 (10th Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Santiago*, 798 F.2d 246, 247-248 (7th Cir. 1986). Where the defense has fully exposed the witness's false or contradictory testimony at trial, the courts do not require the prosecutor to engage in the pointless and redundant

exercise of formally correcting that testimony. See *Joyner*, 201 F.3d at 82; *Santiago*, 798 F.2d at 247-248.[4]

In the instant case, the court of appeals expressly found that any falsehoods in Donaldson's testimony "were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." Pet. App. 57a. The district court gave a "strong cautionary statement in the jury instructions," and petitioners argued at length to the jury that Donaldson's testimony had been thoroughly impeached by the exposure of his falsehoods. *Id.* at 58a & n.10. The court of appeals further explained that Donaldson's false testimony was limited to "collateral matters" and that the rest of Donaldson's trial testimony was "overwhelmingly corroborated by other witnesses." *Id.* at 60a. Petitioners cite no case reversing a criminal conviction under comparable circumstances.

b. Because Donaldson's falsehoods were disclosed at trial, this is not an appropriate case to determine whether the court of appeals erred in using the "reasonable probability" standard of materiality (Pet. App. 52a, 62a) to determine whether a new trial was required. In false testimony cases, this Court has held that reversal is required if there is any "reasonable likelihood" that the false testimony could have affected the jury's verdict. See *Giglio*, 405 U.S. at 154; *Napue*, 360 U.S. at 271. In cases involving the government's failure to disclose exculpatory evidence to the defense, the Court has held that constitutional error occurs if there is a

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[4] The cases cited by petitioners (Pet. 14-15) for the proposition that the prosecutor must correct false testimony involve the situation in which the false testimony was not exposed by any party at trial. They do not suggest, much less require, that the prosecutor must correct false testimony after the defense has already done so.

"reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995). The "reasonable likelihood" standard is more favorable to the defense than the "reasonable probability" standard. *United States* v. *Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998), cert. denied, 526 U.S. 1152 (1999).

It is far from clear that either the "reasonable likelihood" or "reasonable probability" standard applies when the truthful evidence is ultimately disclosed to the defense and the jury at trial. In false testimony cases in which the witness's falsehoods or contradictory statements were ultimately revealed to the jury, some courts of appeals have simply stated that the disclosure of the truth eliminates any taint that the false testimony might otherwise have caused. See, *e.g.*, *Joyner*, 201 F.3d at 82. Similarly, in cases involving the delayed disclosure of exculpatory evidence, some courts of appeals simply ask whether the defense was able to make effective use of the evidence. See, *e.g.*, *United States* v. *Higgins*, 75 F.3d 332, 335 (7th Cir. 1996); *United States* v. *Walsh*, 75 F.3d 1, 8 (1st Cir. 1996).

It is also unclear whether the Fifth Circuit is firmly committed to applying the "reasonable probability" standard in false testimony cases. In two other recent decisions, the Fifth Circuit has stated the test for materiality in a false testimony case as the "reasonable likelihood" standard. See, *e.g.*, *Barrientes* v. *Johnson*, 221 F.3d 741, 752-753 (5th Cir. 2000), cert. dismissed, 121 S. Ct. 902 (2001); *United States* v. *Maloof*, 205 F.3d 819, 827 (5th Cir.), cert. denied, 121 S. Ct. 176 (2000). In any event, petitioner would not be entitled to relief under either a "reasonable probability" or "reasonable likelihood" standard. Donaldson's falsehoods were dis-

closed at trial; the falsehoods referred only to collateral matters; Donaldson's testimony was corroborated by other witnesses; the defense capitalized on the falsehoods to argue to the jury that Donaldson was unworthy of belief; and the jury received an appropriate cautionary instruction.

2. Petitioners contend (Pet. 27-28) that the court of appeals erred in placing on them the burden of establishing prejudice from the district court's failure to instruct the jury on materiality, and that the decision below conflicts with the Second Circuit's decision in *United States* v. *Viola*, 35 F.3d 37 (1994), cert. denied, 513 U.S. 1198 (1995). That claim does not warrant further review.

a. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court explained that under Rule 52(b), a criminal defendant who fails to object to an alleged error at trial is entitled to relief on appeal only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," in the sense of "clear" or "obvious," and (3) that "affect[ed] [his] substantial rights." 507 U.S. at 732-735. Under the third ("substantial rights") prong of the *Olano* analysis, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 734. Even when those showings are made, a reviewing court may exercise its discretion to reverse a conviction for plain error only (4) "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

In *Olano*, the government "essentially concede[d]" that the error in question—the presence of alternate jurors during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c)—was "plain." 507 U.S. at 737. In concluding that the error satisfied the second prong of the "plain error" standard, the Court therefore was not required to "consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. In *Johnson* v. *United States*, 520 U.S. 461, 468 (1997), the Court decided the question left open in *Olano*, holding that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."

b. In *Viola*, 35 F.3d at 41-42, the Second Circuit relied on the above-quoted language from *Olano* in fashioning an exception to the general rule that the defendant bears the burden of establishing prejudice in a plain-error inquiry under Rule 52(b). The *Viola* court held that "[w]hen a supervening decision alters settled law, the three *Olano* conditions for reviewing plain error under Rule 52(b) still must be met, but with one crucial distinction: the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." 35 F.3d at 42;[5] see also *United States* v. *Santiago*, 238 F.3d 213,

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[5] The court in *Viola* acknowledged that a defendant who fails to assert a timely objection at trial "rightly bears the burden of proving prejudice in the ordinary case." 35 F.3d at 42. The court found, however, that "[t]he situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have 'forfeited a right' by

215 (2d Cir. 2001); *United States* v. *Malpeso*, 115 F.3d 155, 165 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998); *United States* v. *Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996), cert. denied, 520 U.S. 1150 (1997); *Napoli* v. *United States*, 45 F.3d 680, 683 (2d Cir.), cert. denied, 514 U.S. 1084 (1995). That holding is incorrect and has been effectively superseded by this Court's decision in *Johnson*.

i. The Court in *Olano* did not leave open (or explicitly allude to) the question whether, in a plain-error inquiry under Rule 52(b), the burden of persuasion as to prejudice should shift to the government when a supervening decision alters settled law. Rather, the *Olano* Court noted (while declining to resolve) the distinct question whether an error is "plain" within the meaning of Rule 52(b) when the law is unsettled at the time of trial but the erroneous character of a district court ruling is clear by the time that the court of appeals decides the case. 507 U.S. at 734; see p. 14, *supra*. The Court later resolved that question in *Johnson*, holding that under those circumstances an error is "plain" for purposes of the second prong of Rule 52(b) analysis. 520 U.S. at 468. Nothing in *Olano* suggests the existence of a "settled law" exception to the Court's facially unqualified holding that under Rule 52(b), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734.

ii. *Johnson* was decided after *Viola* and effectively supersedes *Viola*'s "settled law" exception to the generally applicable requirements of Rule 52(b). In *Johnson*, the district court, in accordance with existing

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not making an objection, since at the time of trial no legal right existed." *Ibid.*

circuit precedent, decided the issue of materiality in a perjury prosecution. 520 U.S. at 463-464. After Johnson was convicted, this Court issued its decision in *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that the materiality of a false statement is a question for the jury. See 520 U.S. at 464. On appeal, Johnson argued that the district court's failure to submit the issue of materiality to the jury required reversal of his conviction. *Ibid.*

This Court held that, given the defendant's failure to assert a timely objection at trial, his challenge was reviewable for plain error under Rule 52(b). Applying the plain-error standard set forth in *Olano*, the *Johnson* Court held that the district court's failure to submit the question of materiality to the jury was error and that the error was plain. 520 U.S. at 467-468. The Court questioned whether the district court's error had affected Johnson's substantial rights. *Id.* at 468-469. The Court declined to resolve that issue, however, finding that in any event the error did not meet the final requirement of *Olano* because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *id.* at 469-470.

Johnson thus makes clear that, even when a district court ruling accords with existing circuit precedent at the time of trial, a defendant who fails to assert a timely objection may obtain relief on appeal only if he can establish plain error under the standards set forth in *Olano*. And, as *Olano* clearly provides, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 507 U.S. at 734; see also *id.* at 741 ("Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This

is a plain-error case, and it is respondents who must persuade the appellate court that the [error] was prejudicial.").[6]

iii. In light of *Johnson*, it is unclear whether the Second Circuit will continue to adhere to *Viola*'s modified plain-error rule. In *United States* v. *Knoll*, 116 F.3d 994 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998), decided after *Johnson*, the Second Circuit rejected the defendant's claim that the trial court's pre-*Gaudin* failure to submit the issue of materiality to the jury in his perjury prosecution constituted plain error. Like this Court in *Johnson*, the Second Circuit in *Knoll* found that the first two prongs of *Olano* were satisfied, but declined to decide whether the error affected the defendant's substantial rights, on the ground that there was no basis for finding that the materiality element was not met and the error therefore did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." See 116 F.3d at 1000-1002. The court declined to address the defendant's argument that *Viola*'s "modified" plain-error standard of review should apply in determining whether the third prong of *Olano* was met. *Id.* at 1001 ("There is no need for us to address this argument * * * because we resolve this

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[6] No other circuit has adopted the modified plain-error rule embraced by the Second Circuit in *Viola*. In *United States* v. *Baumgardner*, 85 F.3d 1305, 1309 n.2 (1996), the Eighth Circuit noted the Second Circuit's holding in *Viola*. The Eighth Circuit declined to address the question, however, stating that "although we find the *Viola* analysis persuasive, we leave the issue of burden-shifting for another day." *Ibid.* The court's decision in *Baumgardner*, moreover, predates *Johnson*, which clarifies that the usual plain-error analysis applies in cases where the contested district court ruling is consistent with then-existing circuit precedent.

appeal without reaching possible issues raised by the third prong of *Olano*."). But see *Santiago*, 238 F.3d at 215 (describing "modified plain error" rule of *Viola* without mentioning *Johnson*, but rejecting defendant's contention that intervening decisions had altered settled circuit law). Until the Second Circuit has either reaffirmed or disavowed the *Viola* standard in light of *Johnson*, review by this Court would be premature.[7]

c. Even if the question whether the defendant or the government bears the burden of proof in this context otherwise warranted this Court's review, the instant case would be an unsuitable vehicle for deciding it. The theory of the government's case was that petitioners and O'Brien persuaded PNRRG and the Louisiana Department of Insurance to approve the reinsurance agreement and to authorize the transfer of over $10 million in cash assets of PNRRG to a trust account with the funds to be held on behalf of BCI, based on the defendants' false assurances that the reinsurance program would be backed by Sphere Drake, that coverage of PNRRG's physicians would continue, and that BCI would pay all future claims. In defining "scheme to defraud," the district court's instructions concerning the government's charge of an intangible-rights deprivation emphasized that a criminal breach of the employee's duty of loyalty may be found "when, with specific intent to defraud, the employee conceals or fails to disclose information which the employee has reason to believe would cause harm to the employer or would lead a reasonable employer to change its business

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[7] In *United States* v. *Malpeso*, *supra*, decided less than one month after this Court's decision in *Johnson*, the Second Circuit applied *Viola*'s modified plain-error standard, without any discussion of *Johnson*. See 115 F.3d at 165.

conduct." 86 R.A. 127. The district court also instructed the jury that "[a] statement or representation is 'false' within the meaning of the wire fraud and mail fraud statutes when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud. To act with intent to defraud means to act with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self." *Ibid.* The court further instructed that "[s]pecific intent to defraud may also be found from a material misstatement of fact made with reckless disregard of the facts." *Id.* at 128. Thus, although "the jury charge did not plainly explain that materiality of falsehood is a separate element of the mail and wire fraud statutes," Pet. App. 17a, the district court's instructions adequately ensured that petitioners would not be convicted of mail or wire fraud based on false statements having no natural capacity to influence the conduct of PNRRG or the Louisiana Department of Insurance.

Indeed, materiality was not seriously contested at trial. Petitioners did not dispute that their activities were capable of influencing the Insurance Department and the insured physicians. Rather, their defense was one of good faith—that their diversion of millions of dollars was legitimate business conduct, conducted not with intent to defraud, but for a legal purpose. See Gov't. C.A. Br. 55-56. Accordingly, allocation of the burden of persuasion to the government on the issue whether any omission of a materiality instruction prejudiced petitioners would have no effect on the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ERIC SCHMIDT, PAUL SCHMITZ, MICHAEL O'KEEFE, SR., and GARY BENNETT,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. There Is a Conflict Among the Circuits.	1
2. Explicit Findings Establish That the False Testimony in This Case Was Not Fully Exposed	3
3. The Government Does Not Deny That the First Two Questions Presented in the Petition Are Important	8
4. The Plain-Error Issue Warrants Review.	8
CONCLUSION	9

TABLE OF AUTHORITIES

Case:	Page
Giglio v. United States, 405 U.S. 150 (1972)	2, 3
Napue v. Illinois, 360 U.S. 264 (1959)	6, 8
People v. Savvides, 136 N.E.2d 853 (N.Y.1956)	8
United States v. Aichele, 941 F.2d 761 (9th Cir. 1991)	1
United States v. Meros, 866 F.2d 1304 (11th Cir. 1989)	2, 3
United States v. Santiago, 238 F.3d 213 (2d Cir. 2001)	9
United States v. Viola, 35 F.3d 37 (2d Cir. 1994)	8

REPLY TO BRIEF IN OPPOSITION

The Government suggests that whether the prosecutor's duty to correct false evidence applies to false testimony by a prosecution witness on cross-examination is not a question (i) that has divided the circuits, or (ii) that is presented by the Court of Appeals' decision in this case. Br. Opp. 9-11. As discussed below, the Government is wrong on both points: there is a conflict in the circuits on this question; and the question is presented by the Court of Appeals' decision. Because the Government does not deny that the question is important, certiorari should be granted to resolve the conflict.

1. There Is a Conflict Among the Circuits.

Citing decisions of the Fourth Circuit and the District of Columbia Circuit, the Government asserts:

> [T]he courts of appeals have held that a defendant's due process rights are violated if a critical government witness testifies falsely, *either on direct or on cross-examination*; the prosecutor does not correct the false testimony; and there is a reasonable likelihood that the false testimony affected the outcome of the trial.

Br. Opp. 10 (emphasis added). The Government has not accurately summarized the case law in the courts of appeals.

Most courts of appeals have held that the prosecutor's duty of correction applies to false testimony of a prosecution witness on cross-examination (*see* Pet. 14-15), but the Fifth Circuit in this case, and the Ninth Circuit in *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991), have held to the contrary. The Government relied upon *Aichele* in appealing

from the District Court's order granting a new trial,[1] and the Court of Appeals chose to follow that decision:

> The prosecution has a duty only to "refrain from knowingly presenting perjured testimony and from knowingly failing to disclose 'that testimony used to convict a defendant was false.'" *Aichele*, 941 F.2d at 766 (quoting *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989)). Thus, when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony. *Id. We have adopted this position* because it is the duty of the jury to determine the credibility of the witnesses. . . .
>
> Not all falsehoods are material partially because of our concern with preserving the adversarial system: it is the prerogative of defense counsel to plan his or her cross-examination strategy, and undue clarification or interruption by the prosecution might interfere with that strategy.

Pet. App. 52a-53a (emphasis added); *see also* Pet. App. 56a ("With respect to the district court's legal conclusion of materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution.").[2]

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[1] *See* Brief for the Appellant, The United States of America, at 33-34, *United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997) (No. 96-31181).

[2] As the Government points out, the false testimony in *Giglio v. United States*, 405 U.S. 150 (1972), occurred on cross-examination. Br. Opp. 9-10. But to the extent that the Fifth Circuit and the Ninth Circuit considered *Giglio*, they may have concluded (incorrectly, in petitioners' view) that that decision was inapposite because it involved a witness's false denial that he had been promised he would not be prosecuted if he cooperated with the Government. *Cf. United States v. Meros*, 866 F.2d 1304, 1310 (11th Cir. 1989) ("Only in cases in which the witness' false

Thus, the Government is incorrect in suggesting that "the courts of appeals" agree a prosecutor's duty of correction applies to false testimony "either on direct or on cross-examination." Br. Opp. 10.[3]

2. Explicit Findings Establish That the False Testimony in This Case Was Not Fully Exposed.

The Government also argues that review is unwarranted because petitioners purportedly exposed the false testimony at trial. Br. Opp. (I) ("the defense exposed the witness's falsehoods during cross-examination"), 9 ("petitioners exposed the witness's false testimony at trial"). According to the Government, this case is controlled by the rule that, "[w]here the defense has fully exposed the witness's false or contradictory testimony at trial, the courts do not require the prosecutor to engage in the pointless and redundant exercise of formally correcting that testimony." Br. Opp. 10-11.[4]

The Government's argument is contrary to the record. The District Court made explicit findings, which were not questioned by the Court of Appeals, that the witness's false testimony was *not* fully exposed. Pet. App. 133a, 136a, 140a.

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testimony conceals his possible bias against the defendant have we found *Giglio*'s mandate applicable.").

[3] Nowhere in its brief in opposition does the Government say whether it agrees with the circuits that limit the prosecutor's duty of correction to falsehoods on direct examination, or with those circuits that require disclosure of falsehoods either on direct examination or on cross-examination.

[4] *See also* Br. Opp. 11 ("Donaldson's falsehoods were disclosed at trial"), 11 n.4 (arguing that the cases cited by petitioners "do not suggest, much less require, that the prosecutor must correct false testimony after the defense has already done so"), 12 (referring to "false testimony cases in which the witness's falsehoods or contradictory statements were ultimately revealed to the jury"), 12-13 ("Donaldson's falsehoods were disclosed at trial").

Indeed, it was precisely because the false testimony was not fully exposed that the District Court determined that petitioners had not received a fair trial:

> The two instances of perjury revealed at trial, though not "corrected" by the government, were explored before the jury and I believed at that time that the jury was able to make the credibility determination called for under the circumstances. The fairness of the trial was called into question, however, by the revelations at oral argument. Although defense counsel elicited admissions from Donaldson on cross-examination that were damaging to his credibility, it has become apparent after trial that *the true nature and scope of Donaldson's perjury was never disclosed or corrected by the government, or revealed on cross-examination by the defendants.*

Pet. App. 140a (emphasis added).

The District Court found that there had been *four* instances of perjury, and that only *two* had been revealed at trial. Pet. App. 133a ("[F]our instances of perjury by Charles Donaldson have been revealed to date. Two of the acts of perjury were revealed during trial."). As the court explained, it was only after the trial that important instances of perjury came to light:

> [A]t oral argument on defendants' post-trial motions, the startling revelation was made by the government lawyers that Donaldson's perjury was not that which seemingly was revealed at trial four months earlier:
>
> > THE COURT: All right. But, is there any question in your mind, Mr. Boitmann, that Mr. Donaldson did, in fact, commit perjury?
> >
> > MR. BOITMANN: I have to answer that by answering: Yes, but not the perjury that everybody has been talking about.

> THE COURT: Oh, there's some other perjury?
>
> Mr. Boitmann then explained that it was the government's position that Donaldson lied on the witness stand at this trial by testifying that he had ever told the FBI agent that O'Keefe had altered the BCI minutes.

Pet. App. 136a.

The District Court found that the witness's false testimony that had not been exposed at trial included his critical lie that the Government was learning for the first time at trial that he had previously made a false accusation against petitioner O'Keefe.[5] That lie was never revealed at the trial. At the time the defense did not know of its falsity, and the Government—which did know—was not telling. As the District Court found,

> [T]he prosecutors sought to preserve their own image by failing to correct Donaldson's testimony, elicited on cross-examination, that the government did not learn of his perjury until during trial. Regardless of the circumstances urged by the government, this testimony conveyed a false impression that the government was in no manner apprised of Donaldson's misconduct.

Pet. App. 145a.[6] Not until after trial was it revealed that Donaldson had lied in testifying that the Government had

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[5] *See* Pet. App. 138a (finding by the District Court that the witness "was not testifying truthfully when he denied that the government had knowledge of his perjury prior to trial"), 38a n.2 (acknowledgment by the Court of Appeals that the District Court had "found that Donaldson uttered a falsehood when he stated that the government did not know, prior to trial, that he had lied concerning altering the minutes").

[6] *See also* Pet. App. 145a (finding that the prosecution had engaged in "an effort to mislead defense counsel in their preparation for trial, to cover up Donaldson's conduct and thereby salvage his credibility, and to protect the credibility of the prosecution itself").

been unaware of his false accusation against petitioner O'Keefe. *See* Pet. App. 137a-138a. The prosecutors managed, as the District Court said, "to preserve their own image"—thereby illegitimately increasing their standing with the jury and the likelihood of the conviction that in fact occurred. This was of great significance in a case in which, as the Court of Appeals noted in its most recent opinion, the defense's version of the acts alleged to be criminal "is not wholly implausible." Pet. App. 12a.[7]

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[7] The Government stresses that defense counsel "argued to the jury that the witness was thoroughly impeached." Br. Opp. 9. In *Napue v. Illinois*, 360 U.S. 264 (1959), this Court rejected a similar effort to save a conviction in the face of proof that false testimony by a prosecution witness had not been disclosed or corrected. *See id.* at 270 ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.").

Defense attorneys frequently argue that prosecution witnesses have been proven unworthy of belief, but here the Government's calculated silence prevented the defense from providing the jury with important additional evidence that would have impeached, not just this one witness, but the Government's entire case. That additional evidence would have been especially significant because, as the District Court found, "the other key government witness" (Johnny Moore) gave "consistently contradictory testimony," Pet. App. 150a, and both Donaldson and Moore had "exchanged their testimony for reduced charges and favorable recommendations by the government at sentencing." Pet. App. 69a (footnotes omitted). Proof that the Government had put Donaldson on the stand despite knowledge that he had lied, and without disclosing or correcting the lie, could well have led the jury to reject the testimony of both Donaldson and Moore, for Moore also stood to save himself prison time by pleasing the Government with his testimony.

Also misplaced is the Government's reliance (Br. Opp. 11) upon the general jury instructions about judging the credibility of witnesses, which explained that a witness may be impeached by showing his testimony concerning a material matter was false, and that the testimony of those testifying for personal advantage should be examined with great care. *See*

The Court of Appeals did not question any of these findings by the District Court. In fact, the Court of Appeals itself acknowledged that only some of the false testimony had been exposed, when the Court of Appeals stated that "the falsehoods were *sufficiently* exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." Pet. App. 57a (emphasis added).

The unquestioned findings by the District Court, establishing that the witness's false testimony had not been fully exposed, were what led the Court of Appeals to address, at the threshold of its analysis of what lies are material for due process purposes, the status of lies on cross-examination. Pet. App. 52a-53a. It was only after the court held that "when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred," Pet. App. 52a, that the court turned to the falsehoods in this case. Pet. App. 54a-59a.[8] And in analyzing those falsehoods, the court emphasized that they occurred on cross-examination. Pet. App. 56a ("With respect to the district court's legal conclusion of

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Record on Appeal, No. 96-31181, vol. 31, pp. 111-13. Such instructions were not remotely comparable to revealing that the Government had known before trial that Donaldson had lied, and had nonetheless called him to testify without disclosure or correction of the lie.

[8] It is instructive to examine how the Government itself characterized the decision reversing the grant of a new trial, when the Government later applied to the Court of Appeals for a writ of mandamus to preclude the District Court from conducting an *in camera* review of FBI 302 reports and other materials. Pet. App. 162a-163a. The Government clearly understood the Court of Appeals' basic holding to have been that the falsehoods were not material because they occurred on cross-examination. *See* Application of the United States of America for Writ of Mandamus, at 4-5, *In re United States of America* (5th Cir.) (No. 98-30652) ("The Court found no Due Process violation. The Court did not address the question of whether Donaldson committed perjury. Instead, it concluded that any perjury that occurred was not 'material,' because it did not occur as part of the prosecution's own case, but rather occurred as a result of the defense's cross-examination. [*O'Keefe*, 128 F.3d] at 894, 895.").

materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution.").

3. The Government Does Not Deny That the First Two Questions Presented in the Petition Are Important.

Once the inaccuracies in the Government's descriptions of the case law and of the record are cleared away, it is apparent that the Government has offered no good reason for denial of the petition. The Government does not dispute that it is an important question whether the prosecutor's "'responsibility and duty to correct what he knows to be false and elicit the truth,'" *Napue v. Illinois*, 360 U.S. 264, 270 (1959) (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956)), applies to false testimony on cross-examination. Similarly, the Government does not deny the importance of the second question presented in the petition, which focuses on whether a prosecutor's failure to correct false testimony requires a new trial if there is any reasonable likelihood that the false testimony could have affected the verdict. The Government acknowledges that "[t]he 'reasonable likelihood' standard is more favorable to the defense than the 'reasonable probability' standard." Br. Opp. 12. The Government argues once again, contrary to the record, that this is not an appropriate case to decide the correct standard because "Donaldson's falsehoods were disclosed at trial." Br. Opp. 11. As discussed above, the District Court's findings establish that some of his falsehoods were never revealed to the jury.

4. The Plain-Error Issue Warrants Review.

This Court also should resolve the conflict between the Court of Appeals' decision and the Second Circuit's decision in *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994). *See*

also United States v. Santiago, 238 F.3d 213, 215 (2d Cir. 2001), *petition for cert. filed* (U.S. Apr. 19, 2001) (No. 00-9553). Although the Government asserts that materiality was not seriously contested at trial, Br. Opp. 19, the Court of Appeals specifically noted in its discussion of the materiality issue that petitioners had "put on a vigorous defense." Pet. App. 18a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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